In the Supreme Court of the United States.

OCTOBER TERM, 1909.

CHARLES R. HEIKE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 849.

NOTICE OF MOTION.

You will please take notice that Lloyd W. Bowers, Solicitor-General of the United States, on behalf of the United States, will, on Monday, April 11, 1910, upon the record of this case, the motion, and the brief in support thereof (copies of which are herewith served upon you), at the opening of the court on that date, or as soon thereafter as counsel can be heard, move the court that the writ of error sued out by said Charles R. Heike as plaintiff in error, running from the Supreme Court to the Circuit Court of the United States for the Southern District of New York, be dismissed, on the ground that the judgment of said Circuit Court, to review which the said writ of error is prosecuted, is not a final judgment, and that therefore the court has no jurisdiction to entertain said writ, and for such other and further relief as shall be proper.

LLOYD W. BOWERS,
Solicitor-General.

MARCH 19, 1910.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

CHARLES R. HEIKE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 849.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.

Comes now the Solicitor-General on behalf of the United States and moves the court to dismiss the above-entitled case.

STATEMENT OF CASE.

The defendant, with five others, was indicted on January 14, 1910, for violations of the customs law in connection with the fraudulent importation of dutiable sugar (R. S., 5445, and sec. 9, Customs Administrative Act), and also for a conspiracy, under section 5440, Revised Statutes, to defraud the United States. The offense charged against Heike and his codefendants was complicity in the notorious weighing frauds on the docks of the Havemeyers & Elder refinery in New York City.

To this indictment Heike filed a special plea, claiming immunity under the act of February 25, 1903 (32 Stat., 904, ch. 755), as amended by the act of June 30, 1906 (34 Stat., 798), on the ground that he had previously testified before the grand juries in investigations of alleged violations of the Sherman antitrust law. The Government filed a replication traversing this plea. The issue thus raised was brought on for trial before Judge Martin and a jury in the Circuit Court of the United States for the Southern District of New York on February 10, 1910.

Upon the conclusion of the taking of testimony both sides moved for the direction of a verdict, and the court directed a verdict in favor of the Government on the issues of the plea (Appendix A, p. 21, *infra*) and replication (Appendix B, p. 30, *infra*).

The crimes charged in the indictment being misdemeanors, counsel for the Government thereupon suggested to the court that sentence might be moved, and asked whether defendant wished to make any motions before such sentence.

The defendant, Heike, then asked for and received the privilege of pleading over, and a plea of "not guilty" was entered by him and received by the court, and the case was set for trial on March 1, 1910 (Appendix C, D, F, pp. 35, 37, 38, 41, 44, *infra*).

In conformity with the practice of the Southern District of New York, no judgment was entered on this direction of a verdict, but under mandamus of this court a judgment for the United States on the

plea, with leave to plead over, was entered *nunc pro tunc* on March 16, 1910, and the clerk's docket amended accordingly (Appendix C, F, pp. 35, 37, 44, *infra*).

On February 25, 1910, a writ of error to the said Circuit Court was allowed by Mr. Justice Lurton, together with an order staying proceedings in that court. The Government now moves to dismiss this writ of error, on the ground that, there being no final judgment of the Circuit Court, there is no right to review by this court in the present status of the case.

THE ISSUE.

The sole question which the Government presents on this motion is this:

Is a judgment entered upon a verdict against a plea of immunity to an indictment, with leave to the defendant to plead over, a final judgment reviewable by this court, where the defendant does in fact plead over "not guilty" and the issue on such plea of "not guilty" is still undetermined and awaiting trial?

The Government believes that, even apart from the foregoing question, there is no appealable question involved in this judgment upon which the case could be brought to this court under section 5 of the Evarts Act, but the lack of jurisdiction in this court by reason of the fact that the judgment is interlocutory seems so conclusive that the argument now is confined solely to that point.

STATUTE.

The plea of immunity was based upon the act of February 25, 1903 (32 Stat., 904, ch. 755):

> * * * No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts [Sherman antitrust and interstate-commerce acts]. * * *

By the amendatory act of June 30, 1906 (34 Stat., 798, ch. 3920), it was provided that the above immunity—

> shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

ARGUMENT.

I.

On its face, the judgment in the present case is merely an interlocutory ruling, and not a final judgment. It is not "the final determination of the case" against the defendant.

It is settled that appeals direct to the Supreme Court, under the provisions of section 5 of the act of March 3, 1891 (26 Stat., 826), may be taken only from a final judgment.

> *McLish* v. *Roff*, 141 U. S., 661.
>
> *Bowker* v. *United States*, 186 U. S., 135, 138.
>
> *Lewis* v. *United States*, October Term, 1909, No. 202; writ of error dismissed March 14, 1910.

The face of a judgment is the test of its finality.

Haseltine v. *Bank*, 183 U. S., 130.
Schlosser v. *Hemphill*, 198 U. S., 173, 175.

The face of this judgment shows that it does not finally determine the cause. On its face, it gives to the defendant the right to plead over. On the issue raised by the new plea, he may be acquitted, a *nolle prosequi* may be entered, or other causes intervene to stop the prosecution and to render consideration of the question of immunity purely academic.

California v. *San Pablo & Tulare Co.*, 149 U. S., 308, 314.
Mills v. *Green*, 159 U. S., 651, 653.
Kimball v. *Kimball*, 174 U. S., 158.

When his plea was overruled, the defendant might have allowed sentence to go against him without asking for any further opportunity of defense; in such a case there would have been a final judgment. But he did not. Instead he sought and received the benefit of a judgment of *respondeat ouster*, under which he pleaded the general issue, and thus left the cause as to which his plea was entered still undetermined in the Circuit Court. *Non constat* now that there will ever be a final judgment against him.

This court has expressly held that such a judgment of *respondeat ouster* is not a final judgment and does not give the right to review to this court.

Rankin v. *State*, 11 Wall., 380.

II.

The immunity statute merely furnishes a defense to a defendant when put on trial. It does not give him freedom from actually being put on trial before a court of competent jurisdiction and according to due process of law.

The evident aim of the immunity statute was to place the defendant who had been compelled to give incriminating testimony in the position of a man who was innocent of such an offense. As to him, the crime was deemed nonexistent. (See *Brown* v. *Walker*, 161 U. S., 591.) Such a defendant, by virtue of his act of giving testimony, entered the class of innocent persons with respect to the offense in question. But he got no greater rights. The innocent man, when falsely accused of crime, must still stand trial and establish his defense. The law recognizes no shorter cut than acquittal as a proof of his innocence. The very objection now urged of the likelihood of an immunized person being put to the trouble of a trial was urged in *Brown* v. *Walker*, *supra*, as a reason why the immunity was insufficient to avoid the constitutional prohibition. It was thus answered by this court:

> The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however inno-

> cent, may be subjected to a civil or criminal prosecution and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. (161 U. S., p. 608.)

The argument of our opponents would seek to give to an immunized person greater rights than to an innocent person. It would seek to deprive the courts of all jurisdiction over him in respect to that offense. Logically, our opponents, in pursuing their interpretation of the immunity statute, should have sought remedy by writ of prohibition or *habeas corpus* against the Circuit Court from even *beginning*, by indictment or arrest, the prosecution against Mr. Heike. This was what was actually attempted by a defendant under the California immunity statute in a precisely similar case. The State of California has an immunity statute essentially similar to the Federal statute, to wit, as follows:

> But no prosecution can afterwards be had against such witness for any such offense concerning which he testified for the *prosecution*. (Penal Code, Cal., sec. 64.)

A defendant who had been a witness before a grand jury, when subsequently indicted in respect to the offenses as to which he had testified, petitioned for a writ of prohibition against the court in which the indictment was filed. The Supreme Court of California denied the writ, holding that the immunity from prosecution should be pleaded as a matter of defense.

And having thus held that such immunity is merely a matter of defense, it proceeded to hold that under the code of California, just as we contend under the Federal practice, the decision of the lower court against that defense should be reviewed only after final judgment upon the merits. This decision, therefore, by the highest court of that State is a direct authority against the contention of our adversaries here.

Rebstock v. *Superior Court of San Francisco*, 146 Cal., 308.

The immunity statute in Wisconsin is in *haec verba* the language of the Federal statute. The regular practice under that statute is to review decisions upon this defense only after final judgment of conviction upon the general issue has been had.

Murphy v. *The State*, 124 Wis., 635.
The State v. *Murphy*, 128 Wis., 201.
Rudolph v. *The State*, 128 Wis., 222.

This court has also pointed out that a preliminary trial of a plea of immunity in bar is not necessary, and that sometimes it may be to the advantage of the defendant to determine such a plea only upon trial of the case upon the merits when all the facts are before the court.

The State v. *Murphy*, 128 Wis., 201, 216.

The practice under the English immunity statutes permits the defense to be raised only under a plea of "not guilty," and to be reviewed only after conviction.

Regina v. *Skeen*, 8 Cox, C. C., 143, 153, Pollock, C. B.

III.

In this respect the defense of immunity is precisely like other defenses to criminal prosecution afforded by the Constitution and the statutes. The overruling of pleas of such defenses does not give rise to final judgments appealable instanter, but to judgments respondeat ouster, which afford the privilege of a review only after the final determination of the case.

There are to be found in the Federal Constitution and statutes many defenses in which the bar to prosecution is stated in as strong or stronger language than that upon which our opponents rely in the immunity statute. Such cases are these:

(*a*) *Statute of limitations.*—"*No person shall be prosecuted, tried,* or punished for any offense * * * unless the indictment is found * * * within three years," etc. (R. S., 1044; see also R. S., 1043, 1046.)

(*b*) *Double jeopardy.*—"Nor shall any person be subject for the same offense to be *twice put in jeopardy* of life or limb." (Constitutional amendment V.) Jeopardy begins as soon as jury is impaneled. (1 Bishop's new Criminal Law, 8th ed., sec. 1014, 5.)

(*c*) *Indictment by grand jury.*—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," etc. (Constitutional Amendment V.)

(*d*) *Privilege of Senators against arrest.*—"They shall in all cases, except treason, felony and breach

of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses," etc. (Constitution, Art. I, sec. 6.)

(*e*) *Immunity from trial except in State and district of crime.*—"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." (Constitutional Amendment VI.)

The foregoing provisions enunciate privileges of the citizen quite as sacred as the privilege against self-incrimination. Their language forbidding violation of these privileges is quite as energetic as the language of the immunity statute. Nevertheless, each of these defenses must be asserted in conformity with the regular procedure of the Federal courts as to trials and appeals. It is perfectly well settled that when these defenses are asserted, in whatever form, whether by special plea in bar, upon demurrer, under the general issue, or by motion to quash, the right of review by the appellate court is exercised only in case of and after a final judgment of conviction. We know of no case where, upon the overruling of a special plea in bar, after a defendant had pleaded over and *while the case was still pending on the general issue*, he was allowed the right of review of the judgment overruling his special plea.

(*a*) *The statute of limitations.*—The practice is uniform that the bar of the statute of limitations is

regularly reviewed after final judgment of conviction; *e. g.*,

Bradford v. *United States*, 152 Fed., 617.
Greene v. *United States*, 154 Fed., 401; *certiorari* denied, 207 U. S., 596.
Streep v. *United States*, 160 U. S., 128.

(*b*) *Double jeopardy.*—Under this provision there is a direct decision of this court denying the right to a review of a judgment *respondeat ouster* after a special plea in bar. The defendant was indicted for murder. He pleaded former acquittal by a court-martial. The state court had held the plea insufficient and remanded him for trial, requiring him to plead over to the indictment. On writ of error to this court, it was held that the judgment of the state court of *respondeat ouster* was not final, and that, therefore, this court was without jurisdiction. This court said:

> It is a rule in criminal law *in favorem vitæ*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury, or upon a point of law decided by the court, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, "not guilty." (4 Blackstone's Commentaries, 338.) And this is the effect of the judgment of reversal rendered by the Supreme Court of Tennessee in this case; so that in no sense can that judgment be deemed a final one. The case must go back and be tried upon its merits, and final judgment

> must be rendered before this court can take jurisdiction. If after that it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency. (*Rankin* v. *The State*, 11 Wall., 380, 381.)

It will be noted that acquittal by court-martial is a complete defense to a subsequent prosecution in the civil courts. (*Grafton* v. *United States*, 206 U. S., 333.) This case of *Rankin* v. *The State*, *supra*, is therefore a perfect analogy to the case at bar and a conclusive authority against our opponents.

See also *State* v. *Horneman* (16 Kan., 452, opinion by Brewer, J.), in which it was held that the overruling of a plea of *autrefois acquit* is not reviewable until after judgment on the merits.

Another case in which the plea of double jeopardy was reviewed only after final judgment of conviction is *Grafton* v. *United States* (206 U. S., 333).

(*c*) *Indictment by grand jury.*—Objections to the constituency of the grand jury are regularly raised only after conviction, *e. g.*,

> *Crowley* v. *United States*, 194 U. S., 461.
> *Breese* v. *United States*, 143 Fed., 250.

(*d*) *Privilege of Senators against arrest.*—Review of the claim of denial of such a privilege has been made only after conviction, *e. g.*,

> *Burton* v. *United States*, 202 U. S., 344.

(*e*) *Immunity from trial, except in State and district of crime.*—The claim of this immunity has been reviewed only after conviction, *e. g.*,

> *Armour* v. *United States*, 207 U. S., 590.

IV.

In sustaining the constitutionality of the Criminal Appeals Act (act of Mar. 2, 1907, 34 Stat., 1246, c. 2564), this court has expressly recognized the nonappealability of such interlocutory judgments as those overruling special pleas in bar.

It is familiar legislative history that the Criminal Appeals Act (act of Mar. 2, 1907, 34 Stat., 1246, c. 2564) was passed because of the decision in the case of *United States* v. *Armour* (142 Fed., 808), sustaining a special plea in bar of immunity under the very statute involved in the present case. By that statute, a right of review was given *to the Government* from judgments on demurrers, motions to quash, *special pleas in bar*, or motions in arrest of judgment. The constitutionality of the statute was immediately attacked on the ground that the right of appeal given thereby was confined to the Government, and did not extend to defendants. When the question came before this court, however, the court pointed out that such decisions upon demurrers, special pleas in bar, etc., *against the Government* were final, while similar decisions *against the defendant* were not final until after judgment of conviction, after which he had the right of review. And the court held that there was no lack of uniformity, and no unfairness between the rights of appeals thus apportioned by the Criminal Appeals Act. (*United States* v. *Bitty*, 208 U. S., 393.) The court used this language:

> *Congress was not required by the Constitution to grant to an accused the privilege of bringing*

> *here, upon the overruling of a demurrer to the indictment and before the final determination of the case against him,* the question of the sufficiency of the indictment, simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute (p. 400).

The court thus expressly recognized that under the Federal practice no right of appeal from such judgments as those overrruling pleas in bar existed in advance of final judgment of conviction against the defendant.

V.

Neither in fact, nor when judged by the traditional rights of defendants in the Federal courts, is any hardship done to the plaintiff in error by making him await final judgment of conviction before his right of review.

A court of competent jurisdiction has, after a full trial, lasting three days, adjudged that the plaintiff in error's claim of immunity from prosecution is not well founded. He is, therefore, not being prosecuted "on account of any transaction, matter, or thing" concerning which he has heretofore testified. Congress, if it so saw fit, could make such a determination of the Circuit Court final for all purposes. It sometimes seems to be forgotten that review of a judgment in a criminal case is merely a matter of

privilege or favor, and not a constitutional right. (*McKane* v. *Durston*, 153 U. S., 684, 687.) "For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court." (*Reetz* v. *Michigan*, 188 U. S., 505, 508.) At least one member of this court has expressed his conviction that "in criminal cases there should be no appeal." (Mr. Justice Brewer in 18 Rep., Am. Bar Assn., 448.) Surely, therefore, it is no hardship to give the privilege of appeal only in the event of and after "final determination of the case" resulting in conviction.

VI.

The construction contended for by our opponents would not only violate the basic theory of appeals in the Federal courts since the first judiciary act, but would inevitably overwhelm this court with interlocutory reviews, from which it has thus far been rigorously saved by Congress and by its own decisions.

All of the constitutional privileges which we have enumerated under Point III may be made the subject of pleas in bar and may raise questions reviewable by this court. Furthermore, under the rules of criminal procedure forbidding duplicity in pleading, each of these defenses (when, as is frequently the case, more than one of them is raised by the defendant in the same case) must be raised by a separate plea. If an appeal lies directly to this court, after a decision against the defendant upon such a plea, it is manifest that several successive interlocutory appeals may be

taken to this court before the defendant is ever brought to trial. Manifestly, also, as soon as such a possibility of postponing their eventual trial becomes known to defendants at large, such a practice will not be discouraged by them. As a result, if this practice was sanctioned, the time of this court could be largely taken up with the hearing of such interlocutory appeals.

An examination of one or two prominent criminal cases will point out, better than any general assertion, the very serious danger which would thus arise. Thus in *Burton* v. *United States* (202 U. S., 344) the defendant asserted three alleged constitutional defenses to the prosecution: (*a*) Jurisdiction of the court; (*b*) his senatorial privilege against prosecution; (*c*) double jeopardy.

If Senator Burton had pursued the method of Mr. Heike and taken these defenses by plea and claimed a writ of error on each defense, he could have come to this court three times successively, before this court would have been finally called upon to pass upon the judgment of conviction.

Again, in the *Greene* and *Gaynor* conspiracy case (154 Fed., 401; *certiorari* denied, 207 U. S., 596), the defendants interposed the following defenses reviewable by this court: (*a*) The jurisdiction of the court; (*b*) rights under foreign treaty (in addition to several other pleas reviewable by the Circuit Court of Appeals).

If those defendants had pursued the method relied on by the plaintiff in error, they could have come to

this court twice and to the Circuit Court of Appeals at least twice more, although when the final conviction was sought to be reviewed by this court even a *certiorari* was denied. It needs no further argument to emphasize the salutary rule stated by this court in *McLish* v. *Roff* (141 U. S., 661):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal (pp. 665–666).

VII.

The cases relied upon by our opponents in their brief in answer to our former application to vacate the stay granted on this writ of error were all civil cases, or cases where the appeal was from a decision finally terminating the cause initiated by the moving party. They were none of them contrary to the general principle upon which we rely or to the controlling authority of *Rankin* v. *The State* (11 Wall., 380, *supra*). Our opponents say, because the order of the court below finally determines the question of immunity between Mr. Heike and the Government, it is therefore appealable. Such a test is far away from the point. In that sense, all interlocutory orders of a court are final. But they do not determine or complete the original or main cause pending against the defendant, and of which these interlocutory orders

are merely a part. This distinction was clearly pointed out by this court in the case of *Alexander* v. *United States* (201 U. S., 117, 121):

> In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order. Then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case (p. 121).

In the present case, the cause or case of which the immunity proceedings are a part is the indictment, and the issue thereon is still pending and undetermined. The defendant himself, instead of accepting the decision on the immunity as final and standing for punishment under the indictment, has joined issue over and kept the original cause alive.

It is respectfully submitted, therefore, that the case should be dismissed for want of jurisdiction.

LLOYD W. BOWERS,
Solicitor-General.

HENRY L. STIMSON,
Special Assistant to the Attorney-General.

FELIX FRANKFURTER,
Assistant United States Attorney.

MARCH 19, 1910.

APPENDIX.

(Portions of record material to the motion.)

A.

PLEA IN BAR OF DEFENDANT HEIKE.

In the Circuit Court of the United States, for the Southern district of New York, second district.

UNITED STATES OF AMERICA *v.* CHARLES R. HEIKE, ERNEST W. GERBRACHT, JAMES W. BENDERNAGEL, HARRY W. WALKER, JEAN M. VOELKER, AND JAMES F. HALLIGAN, JR.

And now on this day comes into court the above-named defendant Charles R. Heike in his own proper person and by counsel, and having heard read the indictment against him in the above entitled proceeding found on the 14th day of January, 1910, says, that the United States ought not further to prosecute said indictment against him because of the following matters and things which he pleads in bar of its prosecution for any and all the alleged offenses therein charged, and he respectfully avers as follows, to wit:

For a plea to each and every of the counts in said indictments contained, this defendant avers:

I. That on or about the 17th and 21st days of June, 1909, there was a proceeding pending before the grand inquest of the body of the people of the United States of America for the Southern district of New York brought under and in pursuance of the

act of Congress of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraint and monopolies" (commonly known as the Sherman antitrust act) and all acts amendatory thereof and supplemental thereto.

II. That on or about the 16th day of June, 1909, this defendant was served with a subpœna in the said proceeding, a true and correct copy of which appears marked "Exhibit A," hereto annexed, and made a part hereof, commanding this defendant to appear and attend forthwith before the said grand inquest of the body of the people of the United States of America for the Southern District of New York at a Circuit Court, to testify and give evidence in the matter of an investigation by the said grand inquest of an alleged violation of the statutes of the United States (Sherman antitrust act) by the American Sugar Refining Company and others on behalf of the United States, and to bring with him and produce before said inquest all records, books, papers and memoranda showing the minutes of the meetings of the executive committee of the board of directors of the American Sugar Refining Company and other record books, papers, and memoranda of the American Sugar Refining Company, all of which is more fully set forth in the said subpœna, Exhibit A.

III. That on or about the 18th day of June, 1909, this defendant was served with a certain other subpœna in the said proceeding, a true and correct copy of which appears marked "Exhibit B," hereto annexed and made a part hereof, commanding this defendant to appear and attend before the said grand inquest of the body of the people of the United States of America for the Southern District

of New York at a Circuit Court on the 21st day of June, 1909, to testify and give evidence in the matter of an investigation by the said grand inquest of an alleged violation of the statutes of the United States (Sherman antitrust act) by the American Sugar Refining Company and others on behalf of the United States, and to bring with him and produce carbon copies or letterpress copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company and this defendant to one Kissel during the years 1903 and 1909, inclusive, to and including the date of said subpoena; all letters from said Kissel to the American Sugar Refining Company H. O. Havemeyer and this defendant; all letters from John E. Parsons and the firm of Parsons, Closson & McIllvaine to the American Sugar Refining Company, H. O. Havemeyer and this defendant; and carbon copies or letterpress copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company and this defendant to the firm of Parsons, Closson & McIllvaine and John E. Parsons, concerning a certain loan made by the said Kissel to one Segal on or about December 30, 1903, and all other deeds, evidences and writings which this defendant had in his custody concerning the premises set forth in the said subpœna.

IV. That this defendant in obedience to said subpœnas appeared before said grand inquest on the 17th and 21st days of June, 1909, and thereupon was duly sworn and was examined and gave testimony under oath and produced and testified concerning documentary evidence, to wit, the said

letters, records, agreements, and memoranda called for by said subpœnas, including checks of the American Sugar Refining Company of New York signed by this defendant as treasurer of said company.

V. That under oath this defendant testified in the said proceeding on the said 17th and 21st days of June, 1909, that he was the secretary and treasurer of the American Sugar Refining Company of New York, and was in charge of the records, books, and minutes of the said Company; that he further gave testimony under oath regarding the incorporation, organization and management of the said American Sugar Refining Company of New York, the business carried on by it in importing sugar into the United States into the port and collection district of New York, its properties and refineries, and the relation of said defendant to said company, all of said testimony relating to the period including the various dates mentioned in the indictment.

VI. That in the said proceeding before the said grand inquest held pursuant to the said act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against this defendant.

VII. That on or about the 1st day of December, 1909, there was a proceeding pending before the grand inquest of the body of the people of the United States of America for the Southern District of New York, brought under and in pursuance of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and mo-

nopolies," commonly known as the Sherman anti-trust act, and all acts amendatory thereof and supplemental thereto.

VIII. That on or about the 29th day of November, 1909, this defendant was served with a subpœna in the said proceeding, a true and correct copy of which appears marked "Exhibit C" hereto annexed and made a part hereof, commanding this defendant to appear and attend before the said grand inquest of the body of the people of the United States of America for the Southern District of New York at the Circuit Court to testify and give evidence in regard to certain alleged violations of the statutes of the United States by the American Sugar Refining Company of New York, and to bring with him and produce before the said grand inquest other books showing the present and past ownership of the stock of said company, all stock books and all transfer books of the American Sugar Refining Company of New York, and all other books showing the present and past ownership of the stock of said company; also all books of minutes of meetings of the board of directors and the meetings of the executive committee of the American Sugar Refining Company from the organization of the said company to the date of the service of the subpœna; also all books of minutes of meetings of the board of directors and of meetings of the executive committee of the American Sugar Refining Company of New York from the organization of said company to the date of the service of the subpœna, and all other deeds in the custody of this defendant concerning the premises.

IX. That in obedience to said subpœna, this defendant appeared before the grand inquest on the

1st day of December, 1909, was duly sworn, and was examined and gave testimony under oath, and produced documentary evidence, to wit, the papers mentioned in said subpœna including the minute books of the board of directors of the American Sugar Refining Company of New York and the minute book of the executive committee of said company. This defendant was then examined and testified under oath in regard to the incorporation, organization of the American Sugar Refining Company of New York, the properties it owned and its refineries, including the Havemeyer & Elder Refinery in Brooklyn, the business carried on by said company in importing sugar into the United States into the port and collection district of New York, and the position held by this defendant in said company. This defendant in obedience to said subpœna produced under oath and testified under oath to the contents of certain records and statistics concerning the output of refineries of said company, including the Havemeyer & Elder Refinery in Brooklyn, N. Y., the method by which the American Sugar Refining Company acquired the properties of the constituent corporations of the Sugar Refineries Company and the Havemeyer & Elder Refinery; the actual production of refined sugar by each of the refineries owned or controlled by the American Sugar Refining Company; the expense accounts of the Havemeyer & Elder Refinery; expense books Nos. 4 and 5 of the Havemeyer & Elder Refinery; salary lists of the Havemeyer & Elder Refinery; raw sugar meltings of all refineries owned and controlled by the American Sugar Refining Company from 1893 to 1907, inclusive; letters and tests relating to tests on importations; monthly and annual refinery financial statements, expenses,

etc., from 1904 to 1908; statements of figures entering into the profit and loss accounts of said company from 1904 to 1908, inclusive; and certain resolutions authorizing expenditures on behalf of said company; and certain private letter books of this defendant, all of said testimony relating to the period including the several dates mentioned in the indictment.

X. That in the said proceeding before the said grand inquest held pursuant to the said act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against this defendant.

XI. That on or about the 5th day of January, 1910, there was a proceeding pending before the grand inquest of the body of the people of the United States of America for the Southern District of New York, brought under and in pursuance of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman antitrust act, and all acts amendatory thereof and supplemental thereto. That on or about said 5th day of January, 1910, this defendant was requested by a certain assistant to the United States district attorney for the Southern District of New York, to appear and attend forthwith before the said grand inquest of the body of the people of the United States of America for the Southern District of New York, at a circuit court, to testify and give evidence in the matter of an investigation by the said grand inquest of an alleged violation of the statutes of the United States (Sherman antitrust act). That this defend-

ant in obedience to said request appeared before said inquest on the 5th day of January, 1910, and thereupon was duly sworn and was examined and gave testimony under oath regarding the output of the American Sugar Refining Company; the ownership of the American Beet Sugar Companies; the capacity of production of the refineries including the Havemeyer & Elder Refinery in Brooklyn and plants of said companies; and the contents of certain letters relating to the affairs and management of said companies, all of said testimony related to the period including the various dates mentioned in the indictment.

XII. That in the said proceeding before the said grand inquest held pursuant to the said act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against this defendant.

XIII. That this defendant is ready to verify and prove the foregoing facts as this court shall direct and award, and that therefore he pleads the same in bar of any prosecution, trial or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein, or in any of the acts thereof, would be to deny him the protection, privilege and immunity of the statutes of the United States in such case made and provided.

Wherefore, this defendant, said Charles R. Heike, prays judgment that this honorable court by its proper entry of record may dismiss and discharge

him from prosecution, trial and punishment under said indictment so found on the 14th day of January, 1910, and now pending in this court against him, and from prosecution and trial for the alleged offenses in said indictment or in any of the counts thereof charged against him.

New York, January 24, 1910.

CHARLES R. HEIKE,

By JOHN B. STANCHFIELD, *His Attorney.*

Office and post-office address, 5 Nassau street, New York City.

I hereby certify that the foregoing plea in bar is not interposed for delay, and that in our opinion it is well founded in point of law.

New York, January 24, 1910.

JOHN B. STANCHFIELD,

Of Counsel for Defendant Heike.

B.

REPLICATION TO PLEA IN BAR.

United States Circuit Court, Southern District of New York.

UNITED STATES *v.* CHARLES R. HEIKE ET AL.

Now comes Henry L. Stimson, special assistant to the Attorney-General of the United States, who prosecutes for the United States in this behalf, and says that the United States ought not to be precluded from prosecuting the indictment herein against said Charles R. Heike by reason of anything pleaded in bar, as alleged in the plea of said Heike entered herein on January 24, 1910; because he denies that said Heike testified orally and he denies that he under oath produced documentary evidence, concerning transactions, matters and things set forth in the indictment herein, in manner and form as said Heike in his said plea alleged; and because he denies that said Heike obtained immunity from prosecution of said indictment by reason of the testimony said Heike gave in the proceedings referred to in said plea, or by reason of the documentary evidence, produced in said proceedings, and in support hereof, the United States is ready to prove and verify the following, as this court may direct:

(1) The prosecution herein exclusively relates to certain frauds on the customs, and involves solely alleged violations of customs law. The Government in this case has been and is represented by

special counsel, distinct from and independent of the regular United States attorney for this district. The defendant, Heike, has never been called before the grand jury which returned this indictment or any indictment against him, nor has he been called before any grand jury whatever on any violation of the customs law, nor has he testified or produced documents before any such grand jury on any such subject.

(2) The proceedings in which said Heike testified and produced documents were entirely distinct and independent proceedings from the one above set forth, and were conducted by the regular United States attorney and his assistants, and in no wise whatsoever related to or concerned the prosecution of the indictment herein. They were both proceedings arising under the act commonly known as the Sherman antitrust law (26 Stat., 289).

(a) The proceedings pending in June, 1909, constituted an inquiry into an alleged violation of the said Sherman antitrust act on the part of the American Sugar Refining Company and certain of its officers, by reason of the acquisition of the Pennsylvania Sugar Refining Company of Philadelphia. The transaction which was the subject-matter of this proceeding has been before the courts in this circuit, and it is only necessary to refer to the opinion of the Circuit Court of Appeals, in considering this transaction, to demonstrate the complete and total separateness of that inquiry in the present prosecution. (See *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed., 254.) Heike was

called by the regular United States attorney solely for the purpose of that investigation, and his testimony and the production of documents by him therein were limited exclusively to testimony and documents exclusively pertinent to the inquiry under the Sherman law, and none of said testimony or said documentary evidence disclosed any facts which would form any part of a crime punishable under the customs laws.

(b) The proceedings pending before the December, 1909, grand jury, in which Defendant Heike was called was likewise an inquiry under the Sherman antitrust law to determine whether or not the American Sugar Refining Company and the American Sugar Refining Company of New York constituted a violation of said Sherman antitrust law. The said Heike was informed through his counsel by the United States attorney that the proceedings which he was conducting related solely to an inquiry under the Sherman antitrust law, and that Heike, as secretary of the American Sugar Refining Company and the American Sugar Refining Company of New York, was subpœnaed to produce certain corporate books, in order that the grand jury might ascertain the intercorporate relations between the American Sugar Refining Company and other corporations. Heike thereupon appeared before said grand jury and was interrogated by the United States attorney or his assistant solely regarding the inquiry into the alleged violations of the Sherman law. His testimony and the production

of documents by him therein were limited exclusively to testimony and documents exclusively pertinent to the inquiry under the Sherman law, and none of said testimony or said documentary evidence disclosed any facts which would form any part of a crime punishable under the customs laws.

(3) As to the proceedings in which Heike testified and produced documents: He appeared in proceedings in no possible way connected with the proceeding herein. So independent were these proceedings from the one herein that none of the law officers engaged in the present prosecution knew of the appearance of said Heike before any of the grand jurors until after the fact of such appearance was chronicled in the public press, and the evidence which said Heike gave and the documents which he produced in said proceedings were entirely unknown to any of the law officers engaged in this prosecution until the plea herein was filed. The transactions, matters and things as to which said Heike testified orally and as to which he produced documentary evidence in the proceedings referred to in said plea were not in fact known to any of the officers prosecuting in behalf of the United States in this case until after the plea filed herein, nor was any of the testimony which he gave or the documentary evidence which he produced made use of in any way in this proceeding, against him or otherwise.

(4) In fact, as to none of the transactions, matters and things set forth in the indictment herein, and for and on account of which this proceeding and prosecution is brought against the defendant, did said Heike testify or produce documents in the pro-

ceedings referred to in said plea; nor could the testimony which he gave or the documents which he produced in the proceedings referred to in said plea form any part of the transactions, matters or things which are the subject of this indictment.

(5) Heretofore, in a proceeding which was begun in February, 1909, said defendant was called as a witness in a proceeding brought by the United States against the American Sugar Refining Company of New York, involving the very frauds here in question, and testified at length as to the transactions, matters and things which are the subject of this indictment, and this he did without claim that any such testimony would in any wise incriminate him and without any claim of any privilege with respect thereto.

Wherefore, the United States prays judgment on the plea against the defendant.

HENRY L. STIMSON,
Special Assistant to the Attorney-General.

Dated February 1, 1910.

C.

DOCKET ENTRIES.

United States Circuit Court.

U. S.

v.

CHARLES R. HEIKE, ERNEST W. GERBRACHT, JAMES F. BENDERNAGLE, HARRY W. WALKER, JEAN M. VOELKER, & JAMES F. HALLIGAN, Jr.

Henry A. Wise, United States attorney; Henry F. Cochrane, Lexow, Mackellar & Wells; John B. Stanchfield, attorney for Heike.

Sections 5445, 5440, section 9, act June 10, 1890.

January 14, 1910. Entered presentment of indictment.
14, 1910. Filed indictment.
17, 1910. Defendant Heike pleads not guilty. One week to withdraw. Bail, $5,000.
17, 1910. Defendant Gerbracht pleads not guilty. One week to withdraw.
17, 1910. Defendant Bendernagle pleads not guilty. One week to withdraw.
17, 1910. Defendant Walker pleads not guilty. One week to withdraw. Bail, $3,000.
17, 1910. Defendant Voelker pleads not guilty. One week to withdraw.
17, 1910. Defendant Halligan, jr., pleads not guilty. One week to withdraw.
24, 1910. Defendant Heike files plea in bar.
24, 1910. Defendants Gerbracht, Walker, Voelker, Bendernagle, and Halligan, jr., plead not guilty with leave to withdraw and file plea in bar on January 28, 1910.
28, 1910. Filed plea in bar of Gerbracht.
28, 1910. Filed plea in bar of Bendernagle.

January 28, 1910. Filed plea in bar of Walker.
28, 1910. Filed plea in bar of Halligan, jr.
28, 1910. Filed affidavit and order impounding five letter press books.
17, 1910. Filed recognizance of Heike.
17, 1910. Filed recognizance of Walker.
February 2, 1910. Filed replication to plea in bar as to Heike.
2, 1910. Filed replication to plea in bar as to Gerbracht.
2, 1910. Filed replication to plea in bar as to Bendernagle.
2, 1910. Filed replication to plea in bar as to Walker.
2, 1910. Filed replication to plea in bar as to Halligan, jr.
4, 1910. Defendant Gerbracht withdraws plea in bar and pleads not guilty.
5, 1910. Defendant Bendernagle withdraws plea in bar and pleads not guilty.
5, 1910. Defendant Walker withdraws plea in bar and pleads not guilty.
5, 1910. Defendant Halligan, jr., withdraws plea in bar and pleads not guilty.
5, 1910. Defendant Heike files rejoinder to replication to special plea in bar.
10, 1910. Filed additional plea in bar. Heike.
10, 1910. Trial begun as to Heike "plea in bar."
11, 1910. Trial continued and adjourned to February 14.
14, 1910. Trial concluded. Verdict dismissing "plea in bar" entered and filed.
14, 1910. Defendant Heike pleads not guilty. Case set for trial Tuesday, March 1, 1910, at 10½ a. m.
26, 1910. Filed stenographer's minutes by telephone order from Judge Martin. Stenographer's minutes delivered to Mr. Denison, Assistant Attorney-General, the same to be returned by said Denison to the files of this court.

February 26, 1910. Filed order re stenographer's minutes.
25, 1910. Filed assignment of errors.
26, 1910. Filed order allowing supersedeas and writ of error.
26, 1910. Filed petition for writ of error.
26, 1910. Filed citation.
26, 1910. Filed writ of error.
March 1, 1910. Trial adjourned to March 16th at 10½ a. m.
7, 1910. Filed bill of exceptions.
16, 1910. Filed order re record of verdict "Judgment be and is hereby entered for the United States upon the verdict with leave to defendant to plead over," as of February 14, 1910 *nunc pro tunc.*
16, 1910. Filed order correcting docket entry as to verdict on plea of immunity so as to make it read as follows: "We the jury upon this issue before us raised by the special plea in bar, the replication and rejoinder, find for the United States."

A true transcript of the docket entries, criminal docket 2, page 356.

JOHN A. SHIELDS, *Clerk.*
W. H. L.

D.

(Extract from the stenographer's minutes of the proceedings at the conclusion of the trial on the plea in bar of the defendant Heike.)

Mr. STANCHFIELD. The defendant excepts, if your honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it.

The COURT. The defendant excepts to the motion made for a verdict and excepts to the court's granting a motion upon the part of the Government?

Mr. STANCHFIELD. Yes, sir; and I was about to add that we except to your granting the motion of the counsel for the Government against the plea; and upon the general issues the defendant, your honor, if you please, pleads not guilty.

Mr. STIMSON. I was going to suggest my friend's plea is premature. Has your honor yet directed a verdict?

The COURT. Well, he understands so.

Mr. STANCHFIELD. I suppose so.

Mr. STIMSON. I have not heard the jury render any verdict of the court yet.

(The foreman of the jury signed a written verdict pursuant to directions of the court.)

Mr. STIMSON. I am going to ask whether the defendant has any further motions before the motion for sentence.

Mr. STANCHFIELD. We have no motions; we plead not guilty to the indictment.

Mr. STIMSON. I have already stated to the court my view that that is a matter for the discretion of the court. I supposed that counsel for the defendant would not state it as a right, but would address to the court the reasons which in their opinion might appeal to the court's discretion for the granting of that motion.

The COURT. What do you say about it? Do you object to it?

Mr. STIMSON. I was listening to hear the reason adduced for it. If I may ask the question directly, I believe that the matter is one for the court's discretion; that it is for the court to say whether or not the defendant shall be allowed to plead over. I think that is all very clear, and I having stated it before, understood that that was the view of the court. I am bound to say that in this case in view of the novelty of the situation which has arisen, and in view of the testimony of the defendant on the stand in this trial which differed materially from the plea put in by his counsel, I am inclined on the part of the Government not to oppose the granting of this privilege of pleading over if the court in its discretion takes the same view. I am unwilling that it should pass as if it were a right on the part of the defendant, and I have already stated very fully my reasons for deeming it not to be a right. I also have the feeling, and that bears directly upon this question, that it should not be allowed except upon conditions imposed in the interest of speedy justice. The defendant has been allowed to take a dilatory plea, that according to the law cancels his right to any further pleading in court of his right. If the court is to grant him a further privilege of putting in a second plea, not his by right, the court certainly has the right, and in the interest of

justice should, exact such conditions as will insure the speedy furtherance of justice in this court.

Mr. STANCHFIELD. In answer to that, if your honor please, I have this observation to make: I have understood that no request would emanate from the government counsel for sentence at this time, and it was in accordance with that understanding that I had made no reference to any desire to be heard upon that question. We are prepared to argue it at length. I have a great many——

The COURT. In view of the position taken by counsel here, without taking any time for going to the jury, arguing the questions of fact, and putting the court to the trouble of instructing the jury, leaves the matter in very different shape than if you had insisted on going to the jury to see if you could not get a disagreement and all that, which I understood very frequently is the case in special matters that are pleaded, but coming to me in the utmost good faith now, claiming there is no dispute as to the evidence, purely a question of law, I certainly should not insist upon judgment in chief unless the Government urge it, and they do not in this case, and I don't know what I should say about it if they did.

Mr. STANCHFIELD. That would require another half day of argument probably to get that in and thrashed out, because I certainly am pretty sure of our position that we could convince you that the defendant ought to be——

The COURT. There is nothing that indicates to me that counsel resorted to this for delay. Of course, the court has taken some little time in thinking it over, but that is not chargeable to you. I do not see that it is necessary for the court to make any ruling

about unnecessary delay; unnecessary delay would not be permitted anyway.

Mr. STIMSON. I was going to suggest this consideration at once: That the case should be set for trial for the opening of the March term, on March 1st, if no other suggestion occurs to the court.

Mr. STANCHFIELD. I haven't anything to say to that suggestion at the present time.

Mr. STIMSON. The statute in regard to demurrers, section 1026, expressly makes that as one of the conditions suggested by the statute, that the case shall proceed at the same term in case of a *respondeat ouster*. Now, I do move for a direction of the court that this case now be set for trial on March 1st.

The COURT. I understand it has been so understood by counsel all round.

Mr. STIMSON. There has been no ruling by the court, and this is a situation which now arises for the first time as to this defendant.

The COURT. The case may be set for trial on Tuesday, March 1st, 1910, at 10.30 o'clock a. m.

E.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

The President of the United States. To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the United States of America, plaintiff, and Charles R. Heike, impleaded with Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Foelker, and James F. Halligan, jr., defendants, a manifest error hath happened, to the great damage of the said Charles R. Heike, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the

laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of February, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by

HORACE H. LURTON,
Associate Justice of the Supreme Court
of the United States.

F.

JUDGMENT OF RESPONDEAT OUSTER.

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court-house and post-office building in the Borough of Manhattan, city of New York, and Southern District of New York, on the 16th day of March, 1910.

Present: Hon. James L. Martin, United States District Court Judge.

UNITED STATES OF AMERICA
v.
CHARLES R. HEIKE ET AL.

Upon reading and filing a certified copy of the order of the Supreme Court of the United States in the matter of Charles R. Heike, petitioner, dated March 14, 1910, it is

Ordered and directed that the clerk of this court enter upon the minutes as of February 14, 1910, after the record of the verdict nunc pro tunc: "Judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over."

JAMES L. MARTIN,
United States District Judge,
Holding Circuit Court.

(Endorsed:) United States Circuit Court, Southern District of New York. Filed March 16, 1910. John A. Shields, clerk.

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In the Supreme Court of the United States of America,

OCTOBER TERM, 1909.

UNITED STATES OF AMERICA versus CHARLES R. HEIKE, Impleaded with Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Voelker and James F. Halligan, Jr., Defendants.	Application for Leave to File Petition.

Now comes the petitioner, Charles R. Heike, by George S. Graham, his attorney and counsel, and moves for leave to file the petition for the writ of mandamus hereto annexed, and he further moves that a rule be entered and issued directing the Circuit Court of the United States for the Southern District of New York, Second Circuit, and the Honorable James L. Martin, Circuit Judge of the United States, to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of the said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

Dated New York, March 5, 1910.

GEORGE S. GRAHAM,
Attorney and Counselor
For Petitioner Charles R. Heike,
Office and Post Office Address,
No. 42 Broadway,
Borough of Manhattan,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1909.

UNITED STATES OF AMERICA versus CHARLES R. HEIKE, Impleaded with Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Voelker and James F. Halligan, Jr., Defendants.	Petition for Order to Show Cause Why Writ of Mandamus Should Not Issue.

To the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Charles R. Heike, one of the defendants above named, respectfully shows:

I. That he was indicted on the 14th day of January, 1910, in the United States Circuit Court for the Southern District of New York, upon an indictment charging him with unlawfully making and effecting, and aiding in effecting certain entries of goods, wares and merchandise into the port and collection district of New York, at less than the true weight thereof, and with conspiracy to defraud the United States of duties upon importations of sugar, a copy of which indictment is hereunto annexed marked "Exhibit A" with the same intent and effect as if herein set out at large.

II. That thereafter he was arraigned upon said 7
indictment in said court, and filed a plea in bar therein, which plea set forth that at certain times therein mentioned, he was brought before certain grand inquests of the body of the people of the United States of America, for the Southern District of New York, in certain proceedings then and there pending brought under and in pursuance of the Act of Congress of July 2d, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Anti-Trust Act, and all Acts amendatory thereof and supplementary thereto, and that in the said proceedings before the said 8
grand inquests held pursuant to the said Acts of Congress, as aforesaid, this defendant testified orally and under oath produced evidence documentary concerning the transactions, matters and things set forth in the indictment herein, and for and on account of which this defendant was prosecuted under said indictment, a copy of which plea is hereunto annexed marked "Exhibit B" with the same intent and effect as if herein set out at large.

III. That thereafter, a replication was filed to the said plea in bar, a copy of which replication is hereunto annexed marked "Exhibit C" with the same intent and effect as if herein set out at large. 9

IV. That thereafter a rejoinder was filed to said replication on behalf of this defendant, a copy of which is hereunto annexed marked "Exhibit D" with the same intent and effect as if herein set out at large.

V. That an additional plea in bar amending the original plea in bar of this defendant, by adding one additional date thereto, was thereafter filed, a copy of which is hereunto annexed marked Ex-

10 hibit E" with the same intent and effect as if herein set out at large.

VI. That thereafter a jury was called and impaneled in said Circuit Court before the Hon. James L. Martin, a Judge of the said court, and the issues raised by the said plea, replication, rejoinder and additional plea, were tried in said court, and evidence was introduced on behalf of this defendant, and on behalf of the Government therein.

VII. That the evidence offered on said trial on behalf of this defendant, showed that in the said
11 proceedings before the said grand inquests under the said Acts of Congress as aforesaid, this defendant did testify, and did produce evidence documentary under oath, concerning transactions, matters and things set forth in the indictment herein, and for and on account of which this proceeding and prosecution was brought against this defendant.

VIII. That at the close of the taking of the testimony at the said trial, the learned Court was requested to instruct the jury to return a verdict in favor of this defendant upon the plea in bar interposed by him, which motion the Court ought to
12 have allowed, as the uncontradicted evidence showed that this defendant had testified, and had produced evidence documentary under oath concerning transactions, matters and things set forth in the indictment herein, and for and on account of which, this proceeding and prosecution was brought. That said motion was denied by the Court and an exception to such denial duly taken on behalf of this defendant.

IX. That at the conclusion of the evidence and upon the denial of the motion of the defendant for

the direction of a verdict in his favor, the said 13
Judge, Hon. James L. Martin, then and there presiding at said trial, orally delivered an opinion in favor of Government and against this defendant, a copy of which opinion is hereto annexed marked "Exhibit F" with the same intent and effect as if herein set forth at large.

X. That immediately after delivering such oral opinion said Judge directed a verdict to be rendered in favor of the Government by the jury which was done forthwith; a copy of which verdict is hereunto annexed marked "Exhibit G", with the same intent and effect as if herein set 14
forth at large.

XI. That a copy of the stenographer's minutes of the proceedings following the delivery of the oral opinion is hereto annexed marked "Exhibit H", with the same intent and effect as if herein set forth at large.

XII. That no formal judgment was or has been filed or entered in said court on such direction of a verdict, or on such verdict, nor does the Clerk's docket state that judgment was rendered.

XIII. That on February 25, 1910, a writ of error was allowed by the United States Supreme Court to the Circuit Court of United States for Southern 15
District of New York, to review the proceedings aforesaid, a copy of which writ of error is hereto annexed marked "Exhibit I", with the same intent and effect as if herein set forth at large.

XIV. That on February 28th, 1910, the Government moved in this court to dismiss said writ of error on the ground that there was no judgment in the record. That thereafter and on March 2d, 1910, this defendant by his counsel

16 moved the Honorable James L. Martin, Circuit Judge then sitting in the United States Circuit Court for the Southern District of New York, to grant the following:

> "At a stated term of the United States Circuit Court for the Southern District of New York held at the United States Courthouse and Post Office building in the Borough of Manhattan, City of New York, Southern District of New York, on the 2d day of March, 1910. Present: Hon. James L. Martin, United States Circuit Court Judge. United States of America vs. Charles R. Heike, impleaded
> 17 with others, defendants, and, now, March 2d, 1910, the Court hereby ordered and directed the Clerk of the Court to enter upon the minutes as of February 14th, 1910, after the record of the verdict, *nunc pro tunc* judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over."

That said motion was denied, and an exception to such denial taken on behalf of this defendant. That a copy of the stenographer's minutes of the proceedings held before Judge Martin on said March 2, 1910, are hereto annexed marked Exhibit
18 J, with the same intent and effect as if herein set forth at large.

XV. That your deponent, the petitioner, is informed and believes that the proceedings before said Court on February 14, 1910, in effect constituted a judgment, and that the record of the court should be amended so as to show the true force and effect of said proceedings, to wit: that a judgment was then entered in favor of the Government and against the defendant on said plea in bar inter-

posed by this defendant, with leave to this defendant to plead over. 19

Wherefore, your petitioner prays that a rule be made and issued from this honorable Court, directing the said Hon. James L. Martin, Circuit Judge of the United States for the Second Circuit, and directing the said Circuit Court of the United States for the Southern District of New York, to show cause why a writ of mandamus should not issue, commanding the said Circuit Court and said Judge to enter *nunc pro tunc* upon the minutes as of February 14th, 1910, after the record of the verdict that judgment be and is hereby entered for the United States upon the verdict, with leave to 20 the defendant to plead over and why a stay of proceedings in the said Circuit Court should not be had; or in the alternative for such other and further relief as to this honorable Court shall seem just and meet.

GEORGE S. GRAHAM,
Attorney for Defendant,
Charles R. Heike,
42 Broadway,
Borough of Manhattan,
City, County and State of New York.

21

22 State of New York, }
County of New York, } ss.:

Charles R. Heike, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, information and belief.

CHARLES R. HEIKE.

Subscribed and sworn to before me }
this 5th day of March, 1910. }

JESSIE MACLANDY,
Notary Public,
23 (Seal) Queens County.

Certificate filed in New York and Queens Counties.

24

Exhibit "A"—Indictment.

25

CIRCUIT COURT OF THE UNITED STATES

FOR THE

SOUTHERN DISTRICT OF NEW YORK,

IN THE SECOND CIRCUIT.

At a Stated Term of the Circuit Court of the United States, etc.

Southern District of New York, ss:

The Jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath present 26

That at all the times hereinafter mentioned the American Sugar Refining Company of New York was a corporation existing under the laws of the State of New York; and was engaged, among other things, in the business of importing into the United State, into the Port and Collection District of New York, through the Collector of said District, from foreign countries, to wit, among others, Cuba and Java, very large quantities of certain goods, wares and merchandise, to wit, raw sugar, which at all said times were subject to duty according to their weight; 27

That during said period and according to the law of the United States and to the regulations of the Secretary of the Treasury and to the usual routine of the United States Custom Service, the said goods, wares and merchandise imported as aforesaid were weighed by Assistant United States Weighers under the direction of the United States Weighers, for the purpose of obtaining data for the proper liquidation of the duties on said imported

goods, wares and merchandise by the Collector of the Port of New York;

That during said periods the amounts of duties on said importations were to be and then and there were liquidated and paid on and according to written statements, to wit: first, United States Weighers' Dock Books, being the official records and reports made by the Assistant United States Weighers when and as in the course of and because of their official duty they weighed the said goods, wares and merchandise, and to wit: second, United States Weighers' Returns, being the official Returns made by the United States Weighers when and as in the course of and because of their official duty they reported and returned the weights of the said goods, wares and merchandise to the Surveyor of the Port of New York and to the Collector of said Port;

That at all said times CHARLES R. HEIKE was an officer, agent and employee of the said American Sugar Refining Company of New York, being the Secretary and the Treasurer thereof;

That at all said times ERNEST W. GERBRACHT was an agent and employee of the said American Sugar Refining Company of New York, being the General Superintendent of the Havemeyer and Elder Refinery of the said Company;

That at all said times JAMES F. BENDERNAGEL was an agent and employee of the said American Sugar Refining Company of New York, being the Cashier at the said Havemeyer and Elder Refinery of the said Company;

That at all said times HARRY W. WALKER was an agent and employee of the said American Sugar Refining Company of New York, being the Assistant Superintendent of the Docks at the said Havemeyer and Elder Refinery of the said Company,

and, being as such, the Assistant to one Spitzer, 31
who at all said times was the Superintendent of the Docks at the said Havemeyer and Elder Refinery of the said Company, and who, as such Superintendent, was among other things in charge on behalf of the said Company of all the weighing of sugar on the said Docks;

That at all said times JEAN M. VOELKER was an agent and employee of the said American Sugar Refining Company of New York, being a Checker or Tallyman on the Docks of the said Havemeyer and Elder Refinery of the said Company, and, as such, being an assistant to the said Spitzer and the said Walker in their said duties, and particularly 32
in reference to the tallying, on behalf of the Company, of the weighing of sugar by the said Assistant United States Weighers;

That at all said times JAMES F. HALLIGAN, JR., was an agent and employee of the said American Sugar Refining Company of New York, being a Checker or Tallyman on the Docks of the said Havemeyer and Elder Refinery of the said Company, and, as such, being an assistant to the said Spitzer and the said Walker in their said duties, and particularly in reference to the tallying on behalf of the Company of the weighting of sugar by the said Assistant United States weighers: 33

That the said

CHARLES R. HEIKE
ERNEST W. GERBRACHT
JAMES F. BENDERNAGEL
HARRY W. WALKER
JEAN M. VOELKER and
JAMES F. HALLIGAN, JR.,

34 did heretofore, to wit, on *August 19th, 1907,* at the Southern District of New York, and within the jurisdiction of this Court, being then and there as aforesaid agents and employees of the American Sugar Refining Company of New York, unlawfully and knowingly make and effect and aid in effecting an entry, through the Collector of the Port and Collection District of New York of certain goods, wares and merchandise, to wit, certain

Eleven Thousand Four Hundred and Ninety-six Bags.

of Centrifugal Sugar, Raw, which then and there
35 were subject to duty according to their weight, and which theretofore, to wit, on *April 5th, 1907,* had been imported and brought into this country on the S. S. *"Olinda",* into the Port and Collection District of New York from a foreign country, to wit, Cuba, by the aforesaid American Sugar Refining Company of New York; and the said men hereinabove specified by name did unlawfully and knowingly make and effect and aid in effecting the said entry of said goods, wares and merchandise at less than the true weight thereof, to wit, at a weight of *3,647,064* pounds gross and *3,618,142* pounds net, both of which said weights then and there were and
36 to the said men hereinabove specified by name then and there were known to be, less than the true weights, gross and net respectively, of the said goods, wares and merchandise; and in truth and in fact, the said goods, wares and merchandise then and there weighed *3,701,186* pounds gross and *3,675,160* pounds net.

And the Grand Jurors, etc., do further present that the said men hereinabove specified by name did make and effect and aid in effecting the said entry as aforesaid, in manner and form and by

means as follows, to wit: by means of two certain 37
fraudulent and false papers and written statements, first to wit, a United States Weigher's Dock Book, being numbered 578, and being the official record and report made by the Assistant United States Weigher when and as he weighed the said goods, wares and merchandise in the course of his official duty, and second, to wit, the United States Weigher's Return, bearing the same number, and being the Return made by the United States Weigher in the course of his official duty, on and according to each and both of which said fraudulent and false papers and written statements the amount of the duties on said entry then and there 38
were to be and then and there were liquidated and paid, whereby then and there the said property was finally completed, and both of which said Dock Book and Return the said men hereinabove specified by name wilfully procured and caused to be fraudulent and false in that day, to wit: said Dock Book and Return, did each fraudulently and falsely state the weight of the said merchandise as a weight which was only the weight, gross and net respectively, at which entry of the said merchandise was as aforesaid made and effected, whereas in truth and in fact the weight thereof then and there was, and to the said men hereinabove specified by name then and there was known 39
to be, greater, and in truth and in fact the weight thereof then and there was the weight, gross and net respectively, hereinabove stated to be the true weight thereof; and by means of the said entry and of the said fraudulent and false papers and written statements the United States was caused to and did liquidate, collect and accept the duty upon the said entry at an amount less by $778.57 than the true duties thereon; whereby the United

States then and there was deprived of the said sum, being a portion of the said true amount of duties on the said merchandise.

AGAINST THE PEACE AND DIGNITY OF THE UNITED STATES OF AMERICA AND CONTRARY TO THE FORM OF THE STATUTE OF THE SAID UNITED STATES IN SUCH CASE MADE AND PROVIDED.

(Second, third and fourth counts are identical with first count, dates and amounts being changed.)

FIFTH COUNT.

And the Grand Jurors, etc., do further on their oath aforesaid here repeat and by reference here incorporate, as fully as if actually here re-written and at length transcribed, each and all of the words and figures set forth, beginning with and inclusive of the words

> "The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present * * *"

on the first page of this indictment, down through and ending with and inclusive of the paragraph beginning

> "That at all said times James F. Halligan, Jr., was an agent and employee. * * *"

And the Grand Jurors, etc., do further on their oath present that the said

CHARLES R. HEIKE,
ERNEST W. GERBRACHT,
JAMES F. BENDERNAGEL,
HARRY W. WALKER,
JEAN M. VOELKER and
JAMES F. HALLIGAN, JR.,

in the District aforesaid, heretofore, to wit: on *March 1st, 1905,* in the Southern District of New York and within the jurisdiction of this Court, did unlawfully and wilfully conspire with each other and with the said *Oliver Spitzer,* and with one *Thomas Kehoe,* one *Edward A. Boyle,* one *John R. Coyle,* one *Patrick J. Hennessey,* and with other persons to the Grand Jurors unknown *to defraud the United States* of lawful money then legally due and hereafter to become due to the United States as duty upon the importations, through the Collector of the Port and the Collection District of New York, of dutiable goods, to wit: raw sugars which theretofore had been so imported from foreign countries and which thereafter were to be so imported by the American Sugar Refining Company of New York; and said conspiracy was to be effected by making and effecting and aiding in effecting the entries, at less than their true weight, of said merchandise, to wit: the aforesaid raw sugars; and such entries we so to be effected among other things, by causing and procuring written statements, to wit: United States Weighers' Dock Books and United States Weigher's Returns falsely and fraudulently to understate the weights of dutiable sugar therein recorded, and by causing and procuring such false and fraudulent statements to be presented, within the Southern District of New York, to the Collector of said Port of New York, as a basis of liquidating the duties on said sugars.

OVERT ACTS.

(1) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said CHARLES R.

HEIKE on *July 29, 1907*, within said Southern District of New York, did endorse a check for the sum of *$1,111.63*, drawn on the Assistant Treasurer of the United States by the Acting Disbursing Agent of the said Collector's office, to the order of the American Sugar Refining Company of New York, and did then and there cause to be paid by the said United States to the said American Sugar Refining Company of New York and to be received by the said American Sugar Refining Company of New York, the said sum, as alleged excess of deposits of duty, which sum in truth and in fact was not such excess, but in truth and in fact was a portion of the duties then and there lawfully due the United States on the entry of certain dutiable sugars imported on *April 25, 1907*, by the said American Sugar Refining Company on the Steamship *"Nora."*

(2) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said CHARLES R. HEIKE on *July 31, 1907*, within said Southern District of New York, did endorse a check for the sum of *$2,701.86*, drawn on the Assistant Treasurer of the United States by the Acting Disbursing Agent of the said Collector's office, to the order of the American Sugar Refining Company of New York, and did then and there cause to be paid by the said United States to the said American Sugar Refining Company of New York and to be received by the said American Sugar Refining Company of New York, the said sum, as alleged excess of deposits of duty, which sum in truth and in fact was not such excess, but in truth and in fact was a portion of the duties then and there lawfully due the United States on the entry of certain dutiable sugars imported on *April 16, 1907*, by the said

American Sugar Refining Company on the Steamship *"Edga."* 49

(3) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said CHARLES R. HEIKE on *August 22, 1907*, within said Southern District of New York, did endorse a check for the sum of *$4,595.34*, drawn on the Assistant Treasurer of the United States by the Acting Disbursing Agent of the said Collector's office, to the order of the American Sugar Refining Company of New York, and did then and there cause to be paid by the said United States to the said American Sugar Refining Company of New York and 50 to be received by the said American Sugar Refining Company of New York, the said sum, as alleged excess of deposits of duty, which sum in truth and in fact was not such excess, but in truth and in fact was a portion of the duties then and there lawfully due the United States on the entry of certain dutiable sugars imported on *June 14, 1907*, by the said American Sugar Refining Company on the Steamship *"John S. Bennet."*

(4) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said CHARLES R. HEIKE on *September 9, 1907*, within said Southern 51 District of New York, did endorse a check for the sum of *$719.83*, drawn on the Assistant Treasurer of the United States by the Acting Disbursing Agent of the said Collector's office, to the order of the American Sugar Refining Company of New York, and did then and there cause to be paid by the said United States to the said American Sugar Refining Company of New York and to be received by the said American Sugar Refining Company of

52 New York, the said sum, as alleged excess of deposits of duty, which sum in truth and in fact was not such excess, but in truth and in fact was a portion of the duties then and there lawfully due the United States on the entry of certain dutiable sugars imported on *April 11, 1907,* by the said American Sugar Refining Company on the Steamship *"Sylvia."*

(5) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof the said JEAN M. VOELKER on *August 9, 1907,* did cause and procure to be presented, within the Southern District of New
53 York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JEAN M. VOELKER was caused and procured to understate, by *46,302* Pounds the weight of certain sugars which then and there were dutiable according to their weight and which theretofore, to wit: on *July 27, 1907,* had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Ulriken."*

54 (6) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof the said JAMES F. HALLIGAN, JR., on *March 26, 1907,* did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JAMES F. HALLIGAN, JR., was caused and procured to understate, by *47,138* Pounds the weight of certain sugars which then and there were duti-

able according to their weight and which theretofore, to wit: on *March 13, 1907*, had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Bound Brook."* 55

(7) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., on *March 28, 1907*, did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JAMES F. HALLIGAN, JR., was caused and procured to understate by *29,624* pounds the weight of certain sugars which then and there were dutiable according to their weight and which theretofore, to wit: on *March 20th, 1907*, had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Disa."* 56

(8) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., THOMAS KEHOE, and EDWARD A. BOYLE, on *June 12th, 1907*, did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JAMES F. HALLIGAN, JR., THOMAS KEHOE, and EDWARD A. BOYLE was caused and procured to understate by *102,816* pounds the weight of certain sugars which then and there were dutiable according to their 57

weight and which theretofore, to wit: on *May 16th, 1907*, had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company on the Steamship *"Santiago."*

(9) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., THOMAS KEHOE, and JOHN R. COYLE on *June 14th, 1907*, did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York which did understate and by said JAMES F. HALLIGAN, JR., THOMAS KEHOE and JOHN R. COYLE was caused and procured to understate by *70,130* pounds the weight of certain sugars which then and there were dutiable according to their weight and which theretofore, to wit: on *May 31st, 1907*, had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Olinda"*.

(10) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., and JOHN R. COYLE, on *July 12th, 1907*, did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JAMES F. HALLIGAN, JR., and JOHN R. COYLE was caused and procured to understate by *33,240* pounds the weight of certain sugars which then and there were dutiable according to their weight and which theretofore, to wit:

on *June 24th, 1907,* had been imported from a for- 61
eign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Esperanza."*

(11) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., and PATRICK J. HENNESSY, on *August 9th, 1907,* did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate, and by said JAMES F. HALLIGAN, 62
JR., and PATRICK J. HENNESSY was caused and procured to understate by *22,960* pounds the weight of certain sugars which then and there were dutiable according to their weight and which theretofore, to wit: on *July 26th, 1907,* had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Olinda."*

(12) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof, the said JAMES F. HALLIGAN, JR., EDWARD A. BOYLE, JOHN R. COYLE and PAT- 63
RICK J. HENNESSY, on *September 7th, 1907,* did cause and procure to be presented, within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JAMES F. HALLIGAN, JR., EDWARD A. BOYLE, JOHN R. COYLE and PATRICK J. HENNESSY was caused and procured to understate by *35,110* pounds the weight of certain sugars

64 which then and there were dutiable according to their weight and which theretofore, to wit: on *August 21st, 1907,* had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Yumuri."*

(13) And the Grand Jurors, etc., do further present that to effect the object of said conspiracy and in pursuance thereof the said JEAN M. VOELKER, THOMAS KEHOE, EDWARD A. BOYLE, JOHN R. COYLE, and PATRICK J. HENNESSEY, on *September 12th, 1907,* did cause and procure to be presented,
65 within the Southern District of New York, an official Return and Report of the United States Weigher to the said Collector of the Port of New York, which did understate and by said JEAN M. VOELKER, THOMAS KEHOE, EDWARD A. BOYLE, JOHN R. COYLE, and PATRICK HENNESSEY, was caused and procured to understate, by *126,408* pounds, the weight of certain sugars which then and there were dutiable according to their weight, and which theretofore, to wit: on *August 24th, 1907,* had been imported from a foreign country into the said Port and Collection District of New York by the said American Sugar Refining Company of New York on the Steamship *"Eva."*

66 (14) And the Grand Jurors do further present that to effect the object of said conspiracy and in pursuance thereof, the said JEAN M. VOELKER, JAMES F. HALLIGAN, JR., THOMAS KEHOE, JOHN R. COYLE and PATRICK J. HENNESSEY did, on *November 20th, 1907,* each of them apply certain fraudulent appliances and devices, to wit: certain steel springs, to certain scales on which then and there the Assistant United States Weighers were weighing certain sugars, dutiable according to their

weight, which theretofore had been imported into the United States into the Port and Collection District of New York from a foreign country, to wit: Java, by the said American Sugar Refining Company of New York by the Steamship *"Strathyre,"* the said weighing by the said Assistant United States Weighers being in the course of their official duty and for the purpose of obtaining data for the proper liquidation of the duties on said sugars by the Collector of the Port of New York; and the effect of said application of the said fraudulent appliances and devices being to cause the said scales to register less than the true weights of the said sugars. 67 68

AGAINST THE PEACE AND DIGNITY OF THE UNITED STATES OF AMERICA AND CONTRARY TO THE FORM OF THE STATUTE OF THE SAID UNITED STATES IN SUCH CASE MADE AND PROVIDED.

(The sixth count is identical with fifth count, dates and amounts being changed.)

HENRY A. WISE,
United States Attorney.

69

70 **Exhibit "B."**

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK,

SECOND DISTRICT.

UNITED STATES OF AMERICA, versus CHARLES R. HEIKE, Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean H. Follker and James F. Halligan, Jr.	Plea in Bar of Defendant Heike.

71

And now on this day comes into court the above named defendant Charles R. Heike in his own proper person and by counsel, and having heard read the indictment against him in the above entitled proceeding found on the 14th day of January,
72 1910, says, that the United States ought not further to prosecute said indictment against him because of the following matters and things which he pleads in bar of its prosecution for any and all the alleged offenses therein charged, and he respectfully avers as follows, to wit:

For a plea to each and every of the counts in said indictments contained, this defendant avers:

I. That on or about the 17th and 21st days of June, 1909, there was a proceeding pending before

the Grand Inquest of the body of the people of the 73
United States of America for the Southern District of New York brought under and in pursuance of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies" (commonly known as the Sherman Anti-Trust Act) and all acts amendatory thereof and supplemental thereto.

II. That on or about the 16th day of June, 1909, this defendant was served with a subpoena in the said proceeding, a true and correct copy of which appears marked Exhibit A hereto annexed, and made a part hereof, commanding this defendant to appear and attend forthwith before the said Grand 74
Inquest of the body of the people of the United States of America for the Southern District of New York at a Circuit Court, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act) by the American Sugar Refining Company and others on behalf of the United States, and to bring with him and produce before said Inquest all records, books, papers and memoranda, showing the minutes of the meetings of the Executive Committee of the Board of Directors of the American Sugar Refining Company and other record books, 75
papers and memoranda of the American Sugar Refining Company, all of which is more fully set forth in the said subpoena, Exhibit A.

III. That on or about the 18th day of June, 1909, this defendant was served with a certain other subpoena in the said proceeding, a true and correct copy of which appears marked "Exhibit B" hereto annexed and made a part hereof, commanding this defendant to appear and attend before the said Grand Inquest of the Body of the People of the

76 United States of America for the Southern District of New York at a Circuit Court on the 21st day of June, 1909, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act) by the American Sugar Refining Company and others on behalf of the United States, and to bring with him and produce carbon copies or letter press copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company and this defendant to one Kissel during the years 1903 and 1909 inclusive, to and
77 including the date of said subpoena; all letters from said Kissel to the American Sugar Refining Company, H. O. Havemeyer and this defendant; all letters from John E. Parsons and the firm of Parsons, Closson & McIllvaine to the American Sugar Refining Company, H. O. Havemeyer and this defendant; and carbon copies or letter press copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company and this defendant to the firm of Parsons, Closson & McIllvaine and John E. Parsons, concerning a certain loan made by the said Kissel to one Segal on or
78 about December 30th, 1903, and all other deeds, evidences and writings which this defendant had in his custody concerning the premises set forth in the said subpœna.

IV. That this defendant in obedience to said subpoenas appeared before said Grand Inquest on the 17th and 21st days of June, 1909, and thereupon was duly sworn and was examined and gave testimony under oath and produced and testified concerning documentary evidence, to wit, the said letters, records, agreements and memoranda called

for by said subpoenas, including checks of the 79
American Sugar Refining Company of New York signed by this defendant as treasurer of said company.

V. That under oath this defendant testified in the said proceeding on the said 17th and 21st days of June, 1909, that he was the Secretary and Treasurer of the American Sugar Refining Company of New York and was in charge of the records, books and minutes of the said Company; that he further gave testimony under oath regarding the incorporation, organization and management of the said American Sugar Refining Company of New York, the business carried on by it in importing sugar 80
into the United States into the Port and Collection District of New York, its properties and refineries and the relation of said defendant to said Company, all of said testimony relating to the period including the various dates mentioned in the indictment.

VI. That in the said proceeding before the said Grand Inquest held pursuant to the said Act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and 81
prosecution is brought against this defendant.

VII. That on or about the 1st day of December, 1909, there was a proceeding pending before the Grand Inquest of the body of the People of the United States of America for the Southern District of New York, brought under and in pursuance of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against

Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act, and all acts amendatory thereof and supplemental thereto.

VIII. That on or about the 29th day of November, 1909, this defendant was served with a subpoena in the said proceeding, a true and correct copy of which appears marked Exhibit C hereto annexed and made a part hereof, commanding this defendant to appear and attend before the said Grand Inquest of the body of the people of the United States of America for the Southern District of New York at the Circuit Court to testify and give evidence in regard to certain alleged violations of the statutes of the United States by the American Sugar Refining Company of New York, and to bring with him and produce before the said Grand Inquest other books showing the present and past ownership of the stock of said Company, all stock books and all transfer books of the American Sugar Refining Company of New York, and all other books showing the present and past ownership of the stock of said Company; also all books of minutes of meetings of the Board of Directors and the meetings of the Executive Committee of the American Sugar Refining Company from the organization of the said Company to the date of the service of the subpoena; also all books of minutes of meetings of the Board of Directors and of meetings of the Executive Committee of the American Sugar Refining Company of New York from the organization of said Company to the date of the service of the subpoena, and all other deeds in the custody of this defendant concerning the premises.

IX. That in obedience to said subpoena, this defendant appeared before the Grand Inquest on

the 1st day of December, 1909, was duly sworn, 85
and was examined and gave testimony under oath,
and produced documentary evidence to wit: the
papers mentioned in said subpoena including the
minute books of the Board of Directors of the
American Sugar Refining Company of New York
and the minute book of its Executive Committee
of said Company. This defendant was then exam-
ined and testified under oath in regard to the incor-
poration, organization of the American Sugar
Refining Company of New York, the properties it
owned and its refineries, including the Havemeyer
and Elder Refinery in Brooklyn, the business car-
ried on by said Company in importing sugar into 86
the United States into the Port and Collection Dis-
trict of New York, and the position held by this
defendant in said Company. This defendant in
obedience to said subpoena produced under oath
and testified under oath to the contents of certain
records and statistics concerning the ouput of refin-
eries of said Company, including the Havemeyer
and Elder Refinery in Brooklyn, N. Y., the method
by which the American Sugar Refining Company
acquired the properties of the constituent corpora-
tions of the Sugar Refineries Company and the
Havemeyer and Elder Refinery; the actual produc-
tion of refined sugar by each of the refineries owned
or controlled by the American Sugar Refining Com- 87
pany; the expense accounts of the Havemeyer &
Elder Refinery; expense books Nos. 4 and 5 of the
Havemeyer & Elder Refinery; salary lists of the
Havemeyer & Elder Refinery; raw sugar meltings
of all refineries owned and controlled by the Ameri-
can Sugar Refining Company from 1893 to 1907,
inclusive; letters and tests relating to tests on im-
portations; monthly and annual refinery financial
statements, expenses, etc., from 1904 to 1908;

88 statements of figures entering into the profit and loss accounts of said Company from 1904 to 1908, inclusive; and certain resolutions authorizing expenditures on behalf of said Company; and certain private letter books of this defendant, all of said testimony relating to the period including the several dates mentioned in the indictment.

X. That in the said proceeding before the said Grand Inquest held pursuant to the said Act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for
89 and on account of which this proceeding and prosecution is brought against this defendant.

XI. That on or about the 5th day of January, 1910, there was a proceeding pending before the Grand Inquest of the body of the people of the United States of America for the Southern District of New York, brought under and in pursuance of the Act of Congress of July 2nd, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the "Sherman Anti-Trust Act," and all acts amendatory thereof and supplemental thereto. That on or about said 5th day of January, 1910,
90 this defendant was requested by a certain assistant to the United States District Attorney for the Southern District of New York, to appear and attend forthwith before the said Grand Inquest of the body of the People of the United States of America for the Southern District of New York, at a Circuit Court, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act).

That this defendant in obedience to said request appeared before said Inquest on the 5th day of January, 1910, and thereupon was duly sworn and was examined and gave testimony under oath regarding the output of the American Sugar Refining Company; the ownership of the American Beet Sugar Companies; the capacity of production of the refineries including the Havemeyer and Elder Refinery in Brooklyn and plants of said Companies; and the contents of certain letters relating to the affairs and management of said Companies, all of said testimony related to the period including the various dates mentioned in the indictment. 91

XII. That in the said proceeding before the said Grand Inquest held pursuant to the said Act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against this defendant. 92

XIII. That this defendant is ready to verify and prove the foregoing facts as this Court shall direct and award, and that therefore he pleads the same in bar of any prosecution, trial or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein, or in any of the acts thereof, would be to deny him the protection, privilege and immunity of the statutes of the United States in such case made and provided. 93

WHEREFORE, this defendant, said Charles R. Heike, prays judgment that this Honorable Court by its proper entry of record, may dismiss and discharge him from prosecution, trial and punishment under said indictment so found on the 14th

94 day of January, 1910, and now pending in this Court against him, and from prosecution and trial for the alleged offenses in said indictment or in any of the counts thereof charged against him.

New York, January 24th, 1910.

CHARLES R. HEIKE,
By JOHN B. STANCHFIELD, his Attorney,
Office and Post-Office Address,
5 Nassau Street,
New York City.

I hereby certify that the foregoing plea in bar
95 is not interposed for delay, and that in our opinion it is well founded in point of law.

New York, January 24th, 1910.

JOHN B. STANCHFIELD,
Of Counsel for Defendant Heike.

EXHIBIT A—ANNEXED TO PLEA IN BAR.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To Charles R. Heike, Esq., Secretary of the American Sugar Refining Co., 117 Wall
96 Street, New York City,

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Southern District of New York, at a Circuit Court, to be held at the United States Court and Post Office Building, Room 119, fourth floor, in the City of New

York, Borough of Manhattan, in and for the said 97
Southern District of New York, forthwith, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act) by the American Sugar Refining Company and others, on behalf of the United States, and not to depart the Court without leave thereof or of the District Attorney, and that you bring with you and produce at the time and place aforesaid, the following papers:

ALL records, books, papers and memoranda showing the minutes of the meetings of the Executive Committee of the Board of Directors of the 98
American Sugar Refining Company relative to a certain loan made by the American Sugar Refining Company on the 30th day of December, 1903, through Gustav E. Kissel as agent, to Adolph Segal, in the sum of $1,250,000; especially the minutes of the meetings held on December 28, 1903, May 23, 1905, June 6, 1905, June 27, 1905, and October 31, 1905;

ALSO all records, books, papers and memoranda showing the minutes of the meetings of the Board of Directors of the American Sugar Refining Company referring to the same loan; especially the minutes of meetings of said Board held on July 11, 99
1905, and November 12, 1907, and all other deeds, evidences and writings which you have in your custody or power concerning the premises; and for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all losses and damages sustained thereby to the party aggrieved, and forfeit Two hundred and fifty dollars in addition thereto.

100 WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States at the Borough of Manhattan, in the City of New York, on the sixteenth day of June, in the year Nineteen hundred and nine.

JOHN A. SHIELDS,
(Seal) Clerk.

EXHIBIT B—ANNEXED TO PLEA IN BAR.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To Charles R. Heike, Esq., Secretary of
101 the American Sugar Refining Company, 117 Wall Street, New York City,

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before the Grand Inquest of the Body of the People of the United States of America for the Southern District of New York, at a Circuit Court to be held at the United States Court and Post Office Building, Room 119, fourth floor, in the City of New York, Borough of Manhattan, in and for the said Southern District of New York, on Monday, the
102 twenty-first day of June, Nineteen hundred and nine, at 11:30 o'clock in the forenoon, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act) by the American Sugar Refining Company and others, on behalf of the United States, and not to depart the court without leave thereof, or of the District Attorney, and that you bring with you and produce at the time and place aforesaid, the following papers:

1. Carbon copies or letter press copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company, and yourself, to Gustav E. Kissel during the years 1903, 1904, 1905, 1906, 1907, 1908 and 1909, to and including the date of this subpoena, concerning a certain loan of One million two hundred and fifty thousand dollars ($1,250,000.00) made by the said Gustav E. Kissel, as agent, on the 30th day of December, 1903, to one Adolph Segal; 103

2. All letters from Gustav E. Kissel to the American Sugar Refining Company, H. O. Havemeyer and yourself concerning the above mentioned loan during the aforesaid period of time: 104

3. All letters from John E. Parsons and the firm of Parsons, Closson & McIlvaine to the American Sugar Refining Company, H. O. Havemeyer or yourself, concerning the above mentioned loan during the aforesaid period of time;

4. Carbon copies or letter press copies of all letters from the American Sugar Refining Company, H. O. Havemeyer on behalf of the American Sugar Refining Company, and yourself, to the firm of Parsons, Closson & McIlvaine and John E. Parsons concerning the above mentioned loan during the aforesaid period of time, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all losses and damages sustained thereby to the party aggrieved, and forfeit Two hundred and fifty dollars in addition thereto. 105

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough

106 of Manhattan, in the City of New York, on the eighteenth day of June, in the year Nineteen hundred and nine.

JOHN A. SHIELDS,
Clerk.

(Seal)

EXHIBIT C—ANNEXED TO PLEA IN BAR.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To Charles R. Heike, 117 Wall St., City, Secretary of American Sugar Refining Company, and Secretary of The American Sugar
107 Refining Company of New York,

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before the Grand Inquest of the Body of the People of the United States of America, for the Southern District of New York, at a Circuit Court, to be held at the United States Court and Post Office Building, Room 119, 4th floor, in the City of New York, in and for the said Southern District on the first day of December, 1909, at 10:30 o'clock, in the forenoon, to testify in regard to certain alleged vio-
108 lations of the Statutes of the United States by the American Sugar Refining Company, and that you bring with you and produce at the time and place aforesaid:

ALL stock books and all transfer books of the American Sugar Refining Company and all other books showing the present and past ownership of the stock of said Company;

ALL stock books and all transfer books of The American Sugar Refining Company of New York

and all other books showing the present and past ownership of the stock of said Company; 109

ALSO all books of minutes of meetings of the Board of Directors and the meetings of the Executive Committee of American Sugar Refining Company from the organization of the said Company to the date of the service of this subpoena;

ALSO all books of minutes of meetings of the Board of Directors and of meetings of the Executive Committee of The American Sugar Refining Company of New York from the organization of said Company to the date of the service of this subpoena, now in your custody and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all losses and damages sustained thereby to the party aggrieved, and forfeit Two hundred and fifty dollars in addition thereto. 110

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, the 29th day of November, 1909.

(Sgd) JOHN A. SHIELDS,
Clerk.

(Seal) 111

112 **Exhibit "C"**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES, vs. CHARLES R. HEIKE, *et al.*	Replication to Plea in Bar.

113

NOW COMES Henry L. Stimson, Special Assistant to the Attorney General of the United States, who prosecutes for the United States in this behalf, and says that the United States ought not to be precluded from prosecuting the indictment herein against said Charles R. Heike by reason of anything pleaded in bar, as alleged in the plea of said Heike entered herein on January 24th, 1910; because he denies that said Heike testified orally and he denies that he under oath produced documentary evidence, concerning transactions,
114 matters and things set forth in the indictment herein, in manner and form as said Heike in his said plea alleged; and because he denies that said Heike obtained immunity from prosecution of said indictment by reason of the testimony said Heike gave in the proceedings referred to in said plea, or by reason of the documentary evidence, produced in said proceedings, and in support hereof, the United States is ready to prove and verify the following, as this Court may direct:

(*1*) The prosecution herein exclusively relates to certain frauds on the Customs, and involves solely alleged violations of Customs law. The Government in this case has been and is represented by special counsel, distinct from and independent of the regular United States Attorney for this District. The Defendant, Heike, has never been called before the Grand Jury which returned this indictment or any indictment against him, nor has he been called before any Grand Jury whatever on any violation of the Customs law, nor has he testified or produced documents before any such Grand Jury on any such subject. 115

(*2*) The proceedings in which said Heike testified and produced documents were entirely distinct and independent proceedings from the one above set forth, and were conducted by the regular United States Attorney and his assistants, and in no wise whatsoever related to or concerned the prosecution of the indictment herein. They were both proceedings arising under the Act commonly known as the Sherman Anti-Trust Law (26 Stat. 289). 116

(a) The proceeding pending in June, 1909, constituted an inquiry into an alleged violation of the said Sherman Anti-Trust Act on the part of the American Sugar Refining Company and certain of its officers, by reason of the acquisition of the Pennsylvania Sugar Refining Company of Philadelphia. The transaction which was the subject matter of this proceeding has been before the courts in this Circuit, and it is only necessary to refer to the opinion of the Circuit Court of Appeals, in considering this transaction, to demonstrate the complete and total separateness of that inquiry in the present prosecution. (See *Penn-* 117

118 *sylvania Sugar Refining Co. vs. American Sugar Refining Co.*, 166 Fed., 254). Heike was called by the regular United States Attorney solely for the purpose of that investigation, and his testimony and the production of documents by him therein were limited exclusively to testimony and documents exclusively pertinent to the inquiry under the Sherman Law, and none of said testimony or said documentary evidence disclosed any facts which would form any part of a crime punishable under the Customs laws.

(b) The proceedings pending before the De-
119 cember, 1909, Grand Jury, in which Defendant Heike was called was likewise an inquiry under the Sherman Anti-Trust Law to determine whether or not the American Sugar Refining Company and the American Sugar Refining Company of New York constituted a violation of said Sherman Anti-Trust Law. The said Heike was informed through his counsel by the United States Attorney that the proceedings which he was conducting related solely to an inquiry under the Sherman Anti-Trust Law, and that Heike, as Secretary of the American Sugar Refining Company and
120 the American Sugar Refining Company of New York, was subpoenaed to produce certain corporate books, in order that the Grand Jury might ascertain the intercorporate relations between the American Sugar Refining Company and other corporations. Heike thereupon appeared before said Grand Jury and was interrogated by the United States Attorney or his assistant solely regarding the inquiry into the alleged violations of the Sherman Law. His testimony and the production

of documents by him therein were limited exclusively to testimony and documents exclusively pertinent to the inquiry under the Sherman Law, and none of said testimony or said documentary evidence disclosed any facts which would form any part of a crime punishable under the Customs Laws. 121

(3) As to the proceedings in which Heike testified and produced documents: he appeared in proceedings in no possible way connected with the proceeding herein. So independent were these proceedings from the one herein that none of the law officers engaged in the present prosecution knew of the appearance of said Heike before any of the Grand Jurors until after the fact of such appearance was chronicled in the public press, and the evidence which said Heike gave and the documents which he produced in said proceedings were entirely unknown to any of the law officers engaged in this prosecution until the plea herein was filed. The transactions, matters and things as to which said Heike testified orally and as to which he produced documentary evidence in the proceedings referred to in said plea were not in fact known to any of the officers prosecuting in behalf of the United States in this case until after the plea filed herein, nor was any of the testimony which he gave or the documentary evidence which he produced made use of in any way in this proceeding, against him or otherwise. 122 123

(4) In fact, as to none of the transactions, matters and things set forth in the indictment herein, and for and on account of which this proceeding and prosecution is brought against the Defendant, did said Heike testify or produce documents in the proceedings referred to in said plea; nor could the

124 testimony which he gave or the documents which he produced in the proceedings referred to in said plea form any part of the transactions, matters or things which are the subject of this indictment.

(5) Heretofore, in a proceedings which was begun in February, 1909, said Defendant was called as a witness in a proceeding brought by the United States against the American Sugar Refining Company of New York, involving the very frauds herein question, and testified at length as to the transactions, matters and things which are the subject of this indictment, and this he did without claim that any such testimony would in any wise incrim-
125 inate him and without any claim of any privilege with respect thereto.

WHEREFORE, the United States prays judgment on the plea against the Defendant.

HENRY L. STIMSON,
Special Assistant to the Attorney General.
Dated February 1, 1910.

126

Exhibit "D." 127

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES, against CHARLES R. HEIKE, *et al.*	Rejoinder to Replication to Special Plea in Bar.

128

Now comes into Court the above named defendant Charles R. Heike, in his own proper person and by counsel, and says:

That the United States ought not further to prosecute the indictment against him because of any of the things averred and alleged by the said Henry L. Stimson, Special Assistant to the Attorney General of the United States prosecuting for the United States in that behalf; and hereby traverses and denies all the averments and allegations contained in the said replication, each and every of them.

129

Wherefore, this defendant, the said Charles R. Heike, prays judgment, and that the issue of fact raised by the said special plea in bar of this defendant and the replication thereto by the said Henry L. Stimson, Special Assistant to the Attorney General of the United States prosecuting for the United States in that behalf, and the rejoinder

130 of this defendant herein, be inquired of by the country; and hereby tenders issue.

Dated New York, February , 1910.

CHAS. R. HEIKE,
By John B. Stanchfield, his Attorney,
Office & P. O. Address,
5 Nassau St.,
New York City.

We hereby certify that the foregoing rejoinder is not interposed for delay, and that in our opinion, it is well founded in point of law.

131 New York, February , 1910.

JOHN B. STANCHFIELD,
GEORGE S. GRAHAM,
Of Counsel for Defendant Heike.

132

Exhibit "E."

133

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK,

SECOND DISTRICT.

UNITED STATES OF AMERICA versus CHARLES R. HEIKE, Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Voelker and James F. Halligan, Jr.	Additional Plea in Bar of Defendant Heike. 134

And now on this day comes into court the above named defendant Charles R. Heike, in his own proper person and by counsel, and having heard read the indictment against him in the above entitled proceeding found on the 14th day of January, 1910, says, that the United States ought not to further prosecute said indictment against him because of the following matters and things which he pleads in bar of its prosecution for any and all of the alleged offenses therein charged, and he respectfully avers as follows, to wit: 135

For a plea to each and every of the counts in said indictments contained, this defendant avers in addition to the matters and things set up in his plea in bar:

I. That on or about the 5th and 7th days of January, 1910, there was a proceeding pending before

136 the Grand Inquest of the body of the People of the United States of America for the Southern District of New York, brought under and in pursuance of the Act of Congress of July 2d, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the "Sherman Anti-Trust Act," and all acts amendatory thereof and supplemental thereto. That on or about said 5th or 7th days of January, 1910, this defendant was requested by a certain assistant to the United States District Attorney for the Southern District of New York, to appear and attend forthwith before the said Grand Inquest of the body of the People of the United States of
137 America for the Southern District of New York, at a Circuit Court, to testify and give evidence in the matter of an investigation by the said Grand Inquest of an alleged violation of the statutes of the United States (Sherman Anti-Trust Act). That this defendant in obedience to said request appeared before said Inquest on the 5th and 7th days of January, 1910, and thereupon was duly sworn and was examined and gave testimony under oath regarding the output of the American Sugar Refining Company; the ownership of the American Beet Sugar Companies; the capacity of production of the refineries including the Havemeyer and Elder
138 Refinery in Brooklyn and plants of said Companies; and the contents of certain letters relating to the affairs and management of said Companies, all of said testimony related to the period including the various dates mentioned in the indictment,

II. That in the said proceeding before the said Grand Inquest held pursuant to the said Act of Congress as aforesaid this defendant testified orally and under oath produced evidence documentary concerning transactions, matters and things set

forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against this defendant. 139

III. That this defendant is ready to verify and prove the foregoing facts as this Court shall direct and award, and that therefore he pleads the same in bar of any prosecution, trial or punishment under said indictment, and says that to prosecute or punish him under said indictment or for any alleged offense charged therein, or in any of the acts thereof, would be to deny him the protection, privilege and immunity of the statutes of the United States in such case made and provided.

Wherefore, this defendant, said Charles R. Heike, prays judgment that this Honorable Court by its proper entry of record, may dismiss and discharge him from prosecution, trial and punishment under said indictment so found on the 14th day of January, 1910, and now pending in this court against him, and from prosecution and trial for the alleged offenses in said indictment or in any of the counts thereof charged against him. 140

New York, February , 1910.

CHARLES R. HEIKE,
By John B. Stanchfield, his Attorney,
Office and Post Office Address, 141
5 Nassau Street,
New York City.

I hereby certify that the foregoing plea in bar is not interposed for delay, and that in our opinion it is well founded in point of law.

New York, February , 1910.

JOHN B. STANCHFIELD,
Of Counsel for Defendant Heike.

142 **Exhibit "F."**

MARTIN, J.: This defendant is indicted with others for defrauding and also for entering into a conspiracy to defraud the Government of the United States of its customs on certain sugars that had been imported by the American Sugar Refining Co. So far as this issue is concerned the defendant does not deny his guilt. He has offered a plea in bar and by it brings upon the record a new issue whereby he asserts that there exists certain facts which, though he may be guilty of all that is charged in this indictment, he cannot be prosecuted
143 or punished therefor.

He says that in such proceedings, which he has enumerated, growing out of or coming before the Grand Jury, the said Grand Inquest held pursuant to the said act of Congress aforesaid, this defendant testified orally and under oath, produced documents concerning the transactions, matters and things set forth in the indictment herein and for and on account of which this proceeding and prosecution is brought against him.

This allegation is traversed or denied by the Government. The defendant's attorneys, in his presence claimed the opening and the affirmative of this issue, and to this the attorneys for the Gov-
144 ernment assented so that the ordinary legal presumption of innocence has been by them voluntarily withdrawn in this issue by this plea in bar. He has chosen this issue and thereby takes the affirmative, and in so doing he must establish the facts pleaded by a fair balance of evidence; or, in other words, by this plea the burden of proof rests upon the defendant.

It was claimed during the progress of the trial by counsel for the defendant that even the issue

thus raised upon this question so volunteered 145
should be sustained unless to the contrary appears beyond a reasonable doubt. If such should be held to be the law, men of means who are able to secure the services of competent and adroit attorneys could block the wheels of justice by successive pleas in bar and perhaps succeed upon some mere conjecture that the defendant said or did something before the Grand Jury whereby he may be shielded by the statute, or some statute.

Evidence beyond a reasonable doubt is only applicable to criminal cases wherein the defendant pleads not guilty. The plea of confession and avoidance removes the requirement of that degree 146
of proof. This case then presents the question as to whether or not the defendant testified before the Grand Jury to any matter, transaction or thing in reference to the offenses alleged against him in this indictment.

Is there a preponderance of evidence tending to show that this testimony before the Grand Jury, or the documents which he produced there, would probably become a link in a chain of evidence to establish his guilt? Not whether some ingenious man may carve out of the mass of innocent facts to which the inquiry before the Grand Jury related some hidden fact whereby it is barely possible that the same would be used against him. It is 147
a question of probability preponderance of evidence to establish that. If the Court were to resort to that extreme it might result in a dangerous practice and defeat the ends of justice. Such is not the law as I understand it covering the trial of the issue raised by the plea in bar. I think the rule is, is it probable from the evidence adduced, is there a preponderance of evidence here that the defendant testified to some matter or thing for or

148 on account of which he now stands charged as a criminal?

It is claimed by counsel for the defendant that a mere statement of the accused before the Grand Jury that he was an officer, secretary I think, of the American Sugar Refining Company, is a fact that of itself affords immunity. Can it be that Congress intended by this immunity statute to afford a shield to a man who has committed a crime by merely swearing to something that is already notorious, and where neither civil or criminal justice can be in the least advanced by the disclosure? Such a construction to my mind would be a per-

149 version of justice.

The thing mainly relied on, however, by counsel for the defendant is that he produced documentary evidence tending to show the amount of sugar melted at the Havemeyer & Elder docks, those being the docks at which the fraud is alleged to have been perpetrated, or in connection with the work done there. The schedule that was referred to produced by the defendant seems to have been a voluntary act on his part, unless it was compulsory by virtue of the subpoena. The subject matter of the investigation by that Grand Jury before which the defendant was summoned was an alleged vio-

150 lation of the Sherman Act. No claim was there made that the Government was defrauded; the claim there was that the conduct of this sugar company was such that the rights of the people were affected by the restraint of trade, and the request of the defendant was that he procure from the books of the Company the amount of sugar melted in all of its different refineries, which included, of course, the Havemeyer & Elder Refinery, and it bore upon the question as to whether this sugar company as a corporation was reaching out and laying its hands upon other companies in restraint of trade;

or, in other words, had it brought into its own 151
grasp the sugar refining business of this country to the dertiment of the people? The defendant testified on this trial that no question was put to him or any request made of him whereby his guilt of the charges set forth in this indictment were even thought of by him. If he did not think of it and how can it be conceived that the attorney for the Government thought of it? Besides, the defendant testified he had no knowledge of the amount of sugar actually melted in any of the refineries of the sugar company until his clerks made the computation requested. He does not even swear that they made a correct one. Is it fairly probable to 152
assume from this evidence that the making of that schedule about which the defendant knew nothing —purely the result of the examination of the books of the corporation, was the furnishing of evidence or the source of evidence, to convict him of this charge of fraud and conspiracy? The statute simply protects the defendant from furnishing evidence against himself, not others. Again, a witness testifying to documentary evidence found in the records of a corporation, if perchance an enquiry were made that may furnish evidence of his guilt, he should then assert his immunity. An officer of a corporation has testimonial powers to extract from its records a mass of facts, usually 153
innocent, and which relate only to his administrative duties. The enquiry of the defendant before the Grand Jury was relevant to general facts apparent upon the books of the company, and facts of which the company invited investigation. The defendant knew prior to the time of his testimony that the President of his company had written to the secretary of the Treasury of the United States and to prosecuting attorneys inviting the fullest

154 and freest examination of the books of the company. The defendant as secretary of the company, had premilgated to the public through the columns of the newspapers the willingness to furnish the Government with any fact that the books of the company might reveal. Under such a state of facts, if that investigation before the Grand Jury by the Government, following the invitation of the officers of the company, reveals any material fact that might incriminate this defendant, he should have asserted it and this warned the attorney, so that he could submit it to the Court, so that the Court could exercise his discretion whether to proceed further, grant the immunity, or stop short of it.

155 The immunity provided by this statute was intended to afford an investigation without its being interrupted by the constitutional privilege of silence, or, in other words, under the constitution, as under the common law, a witness is not obliged to incriminate himself. But to avail himself of that privilege he must ordinarily assert it.

Whether the immunity statute flows out to a witness testifying depends on circumstances. This statute of immunity must be administered with common sense; on the one hand some questions are of such character that the witness would understand naturally and inferentially that he

156 would be immune if he answered, and thus proceed to answer without asserting his right, while under other circumstances it would be his duty to assert it if he intended to rely on it. The administration of this statute involves the same application of common sense that the English Court refers to in the Boyes case (I. B. & S. 331), in language approved by the Supreme Court. "To entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the na-

ture of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. The witness' danger being made to appear, great latitude should be allowed to him." 157

Chief Justice Marshall in the Burr case uses this language: "When two principles come in conflict with each other the court must give them a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen and the principle by which every witness is privileged not to accuse himself can neither of them be entirely disregarded." 158

Applying that principle to the case at bar, the defendant has failed to maintain his plea. Neither he nor the Government attorney, so far as appears here, had the slightest idea that this defendant in his evidence before the Grand Jury revealed a single fact that could be made use of in establishing his guilt of any matter or thing to which this indictment relates. The need of vigorous investigation and punishmnt of offenders of the law is at least as apparent to-day as it ever was, and it is equally apparent that Congress had intended to clothe the Department of Justice with full power to enforce the mandates of the law and to cover the guilty with the mantle of immunity only when essential to ascertain material facts. Immunity or the constitutional privilege for which it is intended as substitute should not be enjoyed beyond a reasonable protection. It relates not to the innocent, but to the guilty, or him who fears prosecution. It is argued that to require the guilty to assert immunity or the constitutional privilege is embarrassing and might result in the necessity of an astute lawyer to advise when and under what cir- 159

160 cumstances to assert his rights. That may be so. The circumstances may be such that the Court should hold that the witness is entitled to immunity, even though not asserted or claimed. No circumstances of that sort, however, are shown here. The very contrary appears.

In this connection, the question of good or bad faith on the part of the prosecuting officers is important. Not only is there a total failure to show any bad faith, but quite the contrary appears from the evidence. There is no evidence that the defendant revealed any fact that will probably be necessary in establishing any guilt that cannot be ob-
161 tained from other sources, and was not known, or in the possession of the Government, except possibly as to the amount of sugar melted by the sugar company in its various refineries, and as to these melting figures the defendant testified at this trial that he knew absolutely nothing.

It is perfectly clear that there was no attempt to extract from this defendant any fact to be used against him on any criminal charge of fraud.

Neither side asked that this case be submitted to the jury. There is no dispute as to the facts, and upon the undisputed facts the defendant has wholly failed to establish the allegation of his plea, and there should therefore, be a verdict ordered to
162 that effect.

I can say, though, if I was going to file an opinion and take time enough to do it, I should cite the authorities upon which I have based the opinion, but I cannot do it within the time allotted to me.

Exhibit "G." 163

"We, the jury upon this issue before us raised by the special plea in bar, the replication and rejoinder, find for the United States."

Exhibit "H."

Mr. Stanchfield: The defendant excepts, if your Honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it. 164

The Court: The defendant excepts to the motion made for a verdict and excepts to the Court's granting a motion upon the part of the government?

Mr. Stanchfield: Yes, sir; and I was about to add that we except to your granting the motion of the counsel for the Government against the plea; and upon the general issues the defendant your Honor, if you please, pleads not guilty.

Mr. Stimson: I was going to suggest my friend's plea is premature. Has your Honor yet directed a verdict? 165

The Court: Well, he understands so.

Mr. Stanchfield: I supposed so.

Mr. Stimson: I have not heard the jury render any verdict of the Court yet.

(The foreman of the jury signed a written verdict pursuant to directions of the Court.)

Mr. Stimson: I am going to ask whether the defendant has any further motions before the motion for sentence.

166 Mr. Stanchfield: We have no motions; we plead not guilty to the indictment.

Mr. Stimson: I have already stated to the Court my view that that is a matter for the discretion of the Court, I supposed that counsel for the defendant would not state it as a right, but would address to the Court the reasons which in their opinion might appeal to the Court's discretion for the granting of that motion.

The Court: What do you say about it? Do you object to it?

Mr. Stimson: I was listening to hear the reason adduced for it. If I may ask the question directly,
167 I believe that the matter is one for the Court's discretion; that it is for the Court to say whether or not the defendant shall be allowed to plead over. I think that is all very clear, and I having stated it before understood that that was the view of the Court. I am bound to say that in this case in view of the novelty of the situation which has arisen, and in view of the testimony of the defendant on the stand in this trial which differed materially from the plea put in by his counsel, I am inclined on the part of the Government not to oppose the granting of this privilege of pleading over if the Court in its discretion takes the same view. I am
168 unwilling that it should pass as if it were a right on the part of the defendant, and I have already stated very fully my reasons for deeming it not to be a right. I also have the feeling, and that bears directly upon this question, that it should not be allowed except upon conditions imposed in the interest of speedy justice. The defendant has been allowed to take a dilatory plea, that according to the law cancels his right to any further pleading in court of his right. If the Court is to grant him a further privilege of putting in a second plea,

not his by right, the Court certainly has the right, 169
and in the interest of justice should, exact such conditions as will insure the speedy furtherance of justice in this court.

Mr. Stanchfield: In answer to that, if your Honor please, I have this observation to make. I have understood that no request would emanate from the Government counsel for sentence at this time, and it was in accordance with that understanding that I had made no reference to any desire to be heard upon that question. We are prepared to argue it at length. I have a great many—

The Court: In view of the position taken by counsel here, without taking any time for going to 170
the jury, arguing the questions of fact, and putting the Court to the trouble of instructing the jury, leaves the matter in very different shape than if you had insisted on going to the jury to see if you could not get a disagreement and all that, which I understood very frequently is the case in special matters that are pleaded, but coming to me in the utmost good faith now, claiming there is no dispute as to the evidence, purely a question of law, I certainly should not insist upon judgment in chief unless the Government urge it, and they do not in this case, and I don't know what I should say about it if they did.

Mr. Stanchfield: That would require another 171
half day of argument probably to get that in and thrashed out, because I certainly am pretty sure of our position that we could convince you that the defendant ought to be—

The Court: There is nothing that indicates to me that counsel resorted to this for delay. Of course, the Court has taken some little time in thinking it over, but that is not chargeable to you. I do not see that it is necessary for the Court to

172 make any ruling about unnecessary delay; unnecessary delay would not be permitted anyway.

Mr. Stimson: I was going to suggest this consideration at once: That the case should be set for trial at the opening of the March Term, on March 1st, if no other suggestion occurs to the Court.

Mr. Stanchfield: I haven't anything to say to that suggestion at the present time.

Mr. Stimson: The statute in regard to demurrers, Sec. 1026, expressly makes that as one of the conditions suggested by the statute, that the case shall proceed at the same term in case of a respondeat ouster. Now, I do move for a direc-
173 tion of the Court that this case now be set for trial on March 1st.

The Court: I understand it has been so understood by counsel all around.

Mr. Stimson: There has been no ruling by the Court, and this is a situation which now arises for the first time as to this defendant.

The Court: The case may be set for trial on Tuesday, March 1st, 1910, at 10:30 o'clock a. m.

Exhibit "I."

174

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which

is in the said Circuit Court before you, or some of you, between The United States of America, plaintiff and Charles R. Heike, impleaded with Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Foelker, and James F. Halligan, Jr. defendants, a manifest error hath happened, to the great damage of the said Charles R. Heike, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, will all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to corerct that error, what of right and according to the laws and customs of the United States should be done. 175 176

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of February, in the year of our Lord one thousand nine hundred and ten.

177

(Seal) (Signed) JAMES H. MCKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by
(Signed) HORACE L. LURTON,
Associate Justice of the Supreme Court
of the Untied States.

178 **Exhibit "J."**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JAMES L. MARTIN, Judge.

UNITED STATES

vs.

179 CHARLES R. HEIKE *et al.*

New York, March 2nd, 1910.

APPEARANCES:

Mr. STIMSON, Mr. DENISON, Mr. FRANKFURTER, for the Government.

Mr. STANCHFIELD for defendant Heike; Mr. MACKELLAR for defendant Bendernagel; Mr. COCHRANE for other defendants.

180

Mr. Stimson: If you Honor please, in the case of the United States against Heike and others I understand that the Court yesterday extended the bail for the appearance of the defendants until today, and they are to be here today.

Mr. Stanchfield: Speaking in behalf, if your Honor please, of the defendant Charles R. Heike,

I desire to call your Honor's attention to the situation that now exists in that case. Subsequent to the trial that took place before you and a jury upon the plea of immunity which was interposed to the indictment by the defendant Heike, a writ of error and a supersedeas has been allowed by an associate Justice of the Supreme Court of the Uinted States; that writ of supersedeas was allowed, if recollection serves me correctly, upon Friday last; the papers reached New York for the purpose of being filed in the proper offices and for service on the following morning to wit, last Saturday. Before those papers reached this City or reached counsel representing the defendant Heike notice of motion for dismissal of that writ of error and the vacation of the supersedeas returnable upon Monday morning last at the opening of the United States Supreme Court in Washington. In obedience to that notice counsel for the defendant Heike appeared before the Supreme Court at Washington and at the time of the argument a few minutes—I want to speak with absoltue accuracy—a few minutes before the case was called to the atention of the Supreme Court, we were handed a printed paper in the Heike case entitled "A motion to vacate order allowing writ of error and to vacate supersedeas, and stay proceedings", which consists of a short brief by Mr. Lloyd W. Bowers, the Solicitor General, an affidavit of Mr. Henry L. Stimson, your Honor's opinion in deciding the issues raised by the immunity plea and a copy of the docket entry in the United States against Heike et al certified to by John A. Shields, Clerk of the Court, and an extract from the stenographer's minutes. It is not necessary for me to state in detail what else appears in that paper.

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184 Now upon the oral argument which was permitted in this matter before the United States Supreme Court the point was made that the records did not disclose a judgment upon the immunity plea and upon that question argument was had orally running over perhaps half an hour—I don't know but more, that is rather a matter of immateriality and indifference at this stage of the case. As a result of that oral argument before the Supreme Court an order was made by the Honorable Chief Justice that upon Monday coming, to-wit, next Monday, the cousnel for Heike should file a brief in answer to the brief handed us last Monday morning.

185 Now if your Honor will look at page 20 on the top line of the page, under date of February 14th you will observer this entry "Trial concluded; verdict of dismissal of plea in bar entered".

Now with reference to that situation I desire to make this observation: That is a copy of the docket entry, I suppose an entry made by the clerk reflecting what he assumed or understood to be the proper entry. My recollection is and I think your Honor will coincide with me in that respect that the verdict was not in that form. Your Honor yourself either wrote out or dictated the verdict—I don't recollect which—stating in substance that upon the issues raised by the indictment the im-

186 munity plea and the replication and various papers involved, the jury should return a verdict in favor of the Government. I don't assume if your Honor please, to give the exact phrasing of that paper for I haven't seen it from that day until this, but that was the substance of it.

The Court: You mean the verdict?

Mr. Stanchfield: Yes. I think your Honor's recollection coincides with mine in that respect, that it is not a full statement of it but it is the substance of it.

Now this is the situation, if your Honor please: 187
An issue was framed and a jury was drawn, evidence was taken and a trial was had and a verdict rendered. Now that constituted the proceeding crystallizing in a judgment, technically speaking, I presume, a judgment of respondeat ouster. Now, if the clerk entered anything in the docket he should have entered instead of verdict dismissing plea in bar, "judgment dismissing plea in bar entered upon the verdict." I shall first ask your Honor to correct as of February 14th that entry upon the docket by changing the word "verdict", to the word "judgment".

Now the mere fact that your Honor directed a 188
verdict and then permitted us to plead over constitutes a judgment.

The Court: That is in the opinion, if I remember correctly.

Mr. Stanchfield: Of course it is in the opinion. What I am trying to get straightened out for reasons I will explain in a moment is the record. I am not asking your Honor to do anything except what I professionally regard as strictly and absolutely right.

Mr. Stimson: Your opinion ended page 17 near the bottom.

The Court: And there should therefore be a 189
verdict ordered to that effect?

Mr. Stanchfield: Of course I know your Honor ordered a verdict. There is no dispute on that. That is my position and I think your Honor's recollection is with mine as to the practical substance of the plea.

Mr. Stimson: Nothing that his Honor has said yet has indicated that his recollection is with yours as to having ordered any judgment. I wish to be heard before any statement to that effect goes on

190 the record. This is being taken for use elsewhere your Honor and I wish to have the statement careful and correct.

Mr. Stanchfield: I have not represented in any way Judge Martin as yet having said anything about any judgment. I am reciting exactly and carefully what took place and I have made clear the relief that I am first asking with reference to your correcting the docket of this Court and of your own clerk by changing the word "verdict" to "judgment".

Mr. Stimson: May I be heard on that or do you wish to make the rest of your motion?

191 Mr. Stanchfield: I am not through and we might as well let this go until I am finished to keep the record straight.

Now an associate Justice of the Supreme Court having allowed this writ of error upon the merits of this case which I am not proposing to further discuss here or now, I ask your Honor in the administration of justice to conform this record—to conform the record—to what took place in legal contemplation and in legal effect before you at that trial. My argument is that when your Honor directed the verdict of the jury that was prepared for them to sign, when that verdict was returned

192 and your Honor permitted a plea over of not guilty there was of necessity a judgment of respondiat ouster. There could be no such legal performance as then occurred without your Honor presupposes the judgment of respondiat ouster; there ought to be the judgment of respondiat ouster before anything else could happen, could transpire, could be done; and I ask your Honor respectfully in the due administration of justice and to protect this defendant's rights to grant the following order nunc pro tunc which I will read: "At a stated

term of the United States Circuit Court for the Southern District of New York held at the United States Court house and Post Office Building in the Borough of Manhattan City of New York Southern District of New York, on the 2nd day of March 1910. Present: Hon. James L. Martin, United States Circuit Court Judge. United States of America vs. Charles R. Heike, impleaded with others, defendants.", and now, March 2nd, if your Honor will watch me for a moment—on March 2nd 1910—"The Court hereby ordered and directed the Clerk of the Court to enter upon the minutes as of February 14th 1910, after the record of the verdict, nunc pro tunc, judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over." If your Honor wants a technical copy of that I have an extra one here; you need not bother to write it down. Because it is our contention that what transpired at the time is embraced accurately and fairly in the judgment that that order asks you to enter. 193 194

Mr. Stimson: Now if your Honor please in regard to that I have this to say: The contention of the defendant upon which this writ of error was obtained reduces simply to an attempt to confuse two entirely distinct things, an attempt to confuse an interlocutory order which under the Federal practice is not now and never has been appealable, with a final judgment in a criminal case, which is appealable. The papers before the Supreme Court embodied in a transcript of the minutes taken before this Court a record of what actually took place before your Honor and showed precisely this distinction. I call your Honor's attention to page 9 and your Honor will doubtless recollect what happened as embodied in the stenographer's min- 195

196 utes printed on that page. Your Honor will remember that after you had finished your opinion announcing that you would direct a verdict, Mr. Stanchfield at once jumped to his feet excepted and pleaded not guilty. The stenographer's minutes are as follows: Mr. Stanchfield: The defendant excepts, if your Honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it. The Court: The defendant excepts to the motion made for a verdict and excepts to the Court's granting a motion on the part of the Government? Mr. Stanch-
197 field: Yes, sir; and I was about to say that we except to your granting the motion of the counsel for the Government against the plea; and upon the general issues the defendant, your Honor, if you please, pleads not guilty. Mr. Stimson: I was going to suggest my friend's plea is premature. Has your Honor yet directed a verdict. The Court: Well he understands so. Mr. Stanchfield"—I think that is a mistake by the stenographer for Mr. Stimson—"Mr. Stanchfield: I have not heard the jury render any verdict of the Court yet. (The Foreman of the Jury signed a written verdict pursuant to the directions of the Court.) Mr. Stim-
198 son"—and now comes the point—I then gave notice that I was about to move for what would be the real final judgment unless the defendant objected to it. My language as quoted in the stenographer's minutes is: "I am going to ask whether the defendant has any further motions before the motion for sentence. Mr. Stanchfield: We have no further motions; we plead not guilty to the indictment." Then followed as your Honor will remember, an argument set out in here as to the discretionary power of the Court and your Honor in view of my

withdrawing any objection to their having the discretionary right to plead over restrained from entering any final judgment of sentence and permitted them to plead over. That matter was brought out very fully in the argument before the Supreem Court, and the question is simply this: The defendant when confornted with the alternative of either having a final judgment pronounced upon him and standing as a sentenced criminal on the one side, which would give him a right to appeal, deliberately and on the earnest request of his counsel, chose the other course which prevented such a final judgment from being entered and obtained from the mercy of the Court the right to plead over, the privilege of pleading over. Having done that he now goes to a Justice of the Supreme Court and seeks to get the right to appeal—from what? From the interlocutory order or verdict or order entered on the verdict if there should be one, directing a verdict against his plea of immunity after he has waived it by pleading not guilty and going on.

Now this motion this morning is a further attempt on that same line by introducing into the record of the Court the word "judgment"; is a plain continuation of the attempt to give the color of a final judgment to the transaction which took place before your Honor, that transaction in substance being a case where he had begged that a final judgment should not enter and succeeded in preventing it.

Now upon the question of whether or not any further step in the record is necessary or proper, my own impression of the practice is that no order of any kind is necessary beyond the direction of your Honor to the foreman of the jury to return such a verdict, and the returning of the verdict precisely as the stenographer's minutes show took

202 place. The record of the clerk of the Court, as my friend has conceded on his argument, represents precisely what was done. There is no doubt about that.

The Court: The only thing I observe in this record, Mr. Stimson, is that it is the verdict of the jury; I think the verdict was dictated.

Mr. Stimson: Here is the verdict.

The Court: This record that I have before me says that the jury returned a verdict in substance that the plea being dismissed—

Mr. Stimson: That is an informal statement of the precise language of the verdict which you
203 directed and which the foreman returned, and which reads as follows: "We, the jury, upon this issue before us raised by the special plea in bar, the replication and rejoinder, find for the United States."

The Court: Of course, the clerk's record must be right.

Mr. Stimson: This paper I have in my hand I understand comes from the clerk. This is the original verdict we got from the clerk. Of course, I have no objection to the words verdict dismissing plea in bar in it being changed to conform to the exact language of the original verdict. Now, I
204 further question whether there should be any further action of your Honor sitting as the Court after that verdict. It is possible that the Government will have no objection on conference to having an order in the form clearly of an interlocutory order entered upon the records, provided it be not done so as to give the color of a form of final judgment, which Mr. Stanchfield's motion aims to give it. To talk of a judgment respondiat ouster in any sense of a final judgment is to talk of two mutually inconsistent things—respondiat ouster, meaning on its face that any order giving it is not final.

That is what this situation reduces to. To speak 205
of a final judgment respondiat ouster is to make, colloquially, an Irish Bull.

Now, I should also, I think, remind your Honor before I sit down, of the argument which my friend made in open court before your Honor on this very question. There was no doubt in his mind, so far as he expressed his mind to your Honor at the time when he was asking a question whether or not your Honor should direct a verdict, that he had no right of appeal. This is the quotation from the argument made before your Honor: Mr. Stanchfield, at page 4 of the record: "Whether or no your Honor is familiar with the fact, I am not advised, 206
but subsequent to the decision in the case of U. S. v. Armour, Congress passed a law conferring upon the Government the right of appeal in cases analagous to the situation that here exists. That is, if your Honor were disposed to uphold our contention and direct a verdict in favor of the defendant upon this proceeding the United States Government have a right to review that decision. If, upon the other hand, you should decline to direct a verdict in our behalf, and should direct one in favor of the Government, why then there is left to us under that statute, for reasons I do not understand, no right of appeal. In other words, 207
we would be relegated to a trial upon the merits, and the only way in which we could review the question at all would be in the event of disaster upon the trial, and in the record going up from that result would probably be incorporated as a part of the record the proceedings that had taken place upon the trial of this preliminary plea." My friend's statement there is undisputed as far as I know until this motion was made. The undisputed practice of the Federal Courts, the practice upon

208 which we stand now, the practice upon which we moved day before yesterday in the Supreme Court to set aside this unprecedented writ of error, and the practice upon which I trust the Supreme Court will find that writ of error should be set aside.

I suggest to your Honor that I shall myself consider the draft that we are at work on now of a possible interlocutory order, and discuss it with my associates here, and perhaps in that event suggest to your Honor a form to which we have no objection; but the matter having been brought up now for the first time I wish a few minutes to do that.

Mr. Stanchfield: Now, if your Honor please, in
209 reply I have this general answer to make to what I regard as a most unfair, discourteous and unprofessional criticism made by Mr. Stimson, both in this printed brief and upon the argument before you with reference to the position I took upon the question of appeal. It is perfectly apparent to any fair-minded man who reads that argument that I was discussing a right of appeal under the statute passed by the Congress of the United States subsequent to the decision in the Armour case, and that all the way through, in the language in which he questions there was reference direct and indirect to that statute, and that my argument and contention at that time was predicated upon that statute
210 and no other.

Now I understand that granting this order is a matter of right and a matter of course, and that this defendant is entitled to have that relief. I have now no opinion to express one way or other with reference to any orders or amendments that Mr. Stimson desires your Honor to make; I am asking for the relief that my motion calls for to meet a criticism already made by the Government, that is on file in the Supreme Court of the United

States at Washington. They cannot be permitted 211
to file or use additional papers upon Monday next. The only thing that is there is for me to file by the order an answer to this printed paper, calling for the dismissal of this writ of error, and the vacation of that supersedeas, and in order that the record shall fairly present what I assert took place before you in the very nature of things I am asking that the records—your records of this court—be corrected to correspond to the facts, and I do that in the interests of time and to avoid any further delay or the necessity of my instituting any further proceedings in the Supreme Court of the United States to obtain the taking up of this entire record 212
so that it can determine for itself, in the event this relief is refused, whether or no any such judgment was in fact had.

The Court: My recollection is quite clear as to what occurred at the trial. I observe here at page 9 the Court says: "Well, he understands so". The word "he", I don't know what it would relate to there, but the Court intended that it should have reference to the Court—that the Court understood that he directed a verdict; that was the meaning of what was said there. I have no recollection of directing judgment in the case one way or the other. I intimated some time before the trial of this issue 213
on the plea in bar, that the respondent was not entitled to two separate, independent jury trials as a matter of right, and I also intimated that the Court would not be inclined to exercise its discretion in permitting the respondent to plead over if the Court though it was done for delay. On the close of the trial and the order referred to, writing it out by the Court, then dictating of it by the Court, and the signing of it by the foreman, the only thing that I recall now is that counsel for the defendant asked leave to enter a plea of not guilty.

214 There were remarks made by the District Attorney preceding that or immediately after that as to whether there were other motions to be made before sentence, and Counsel for Mr. Heike, Mr. Stanchfield I think, said that they entered a plea of not guilty, and Mr. Stimson, in behalf of the Government, did not object to it, and thereupon the Court made the remark that he had seen nothing to indicate that it was purely for delay, and therefore granted that right to enter a plea of not guilty. I should understand that any court would construe that proceeding to be an order in effect dismissing the plea in bar; whether I so stated at the time or
215 not I have no recollection, but that was my understanding of it, so that I say now that may be incorporated in the record if desired, that my understanding of what occurred amounted to an order by the Court upon that verdict dismissing the plea in bar.

Mr. Stimson: I have no objection —

Mr. Stanchfield: To that I except.

Mr. Stimson: That order should be entered in that form. It is rather informally drawn. (Handing paper to Court).

Mr. Stanchfield: Will your Honor rule upon my two motions?

The Court: I may just state the rule as I have
216 indicated here, no more and no less.

Mr. Stanchfield: Your Honor declines, then, to rule upon the specific motions that I made?

The Court: The Court rules that there was nothing said or done at that time as to a judgment; whether what was said amounts in legal effect to a judgment, why, the Supreme Court can pass upon it. It is not necessary for me; I cannot change the record.

Mr. Stanchfield: Then I except.

Mr. Stimson: As a part of that I move that— 217

Mr. Stanchfield: If your Honor please I insist upon getting this record straight. I have the floor at the present time; I haven't any objection to Mr. Stimson making all the motions he pleases when it is his turn.

The Court: The Court declining to go further, as I understand, Mr. Stanchfield desires an exception.

Mr. Stanchfield: I except specifically to your refusal to amend the entry under date of February 14th, at the top of page 20, by substituting the word "judgment" in the place of the word "verdict". I also specifically except to your 218 Honor's refusal to enter the formal order of judgment nunc pro tunc in the language "Judgment be and is hereby entered for the United States upon the verdict with leave to the defendand to plead over."

Mr. Stimson: Upon that, your Honor, I move that your Honor amend the docket entries of the Clerk in the form which I have drafted there roughly; I will put it in typewritten form if your Honor desires, and I should prefer to have no further ruling made until that is passed on. It is a little hard to read in longhand. This is merely a more formal way of expressing what I think you have expressed informally by dictation to the Clerk. 219

Mr. Stanchfield: I object to any—

The Court: Doesn't the Clerk's record show that the case was set down for trial on March 1st?

Mr. Stimson: The Stenographer's minutes show that, but the docket does not, and for that reason I wish to have the docket conform to the Stenographer's minutes, which I now hand your Honor.

Mr. Stanchfield: I object at this time and place to any amendment made or asked putting in the

220 docket entries or any records of this Court to change the existing situation.

Mr. Stimson: And I state that my motion is to supplement the motion made by Mr. Stanchfield, except that it conforms to what I conceive to be the real facts, and I leave it to the Court to decide between us.

The Court: Does not the Clerk's record also show that the Respondent entered a plea of not guilty?

Mr. Stimson: Oh yes.

Mr. Stanchfield: Certainly. You have it on page 20, the second sentence.

221 The Court: The only amendment—you see I cannot amend this statement, and you don't ask for that. The only thing I could alter would be the Clerk's minutes to show the adjournment of that hearing to March 1st at 10:30. You say that does not appear on the Clerk's record?

Mr. Stanchfield: To that I take an exception. I never saw the Clerk's record.

The Clerk: I took it down this way in the record: On motion of Mr. Stimson, case set for trial on Tuesday March 1st, 1910, at 10:30 a. m.

The Court: You have it right there in the record.

222 Mr. Stanchfield: To that I take an exception.

The Court: I will let this matter stand as the records show it, with the statement I have made here to the Stenographer as to my understanding of the legal effect.

Mr. Stimson: Your Honor, I make this suggestion: While your Honor's statement conforms to the practice of this district, as I understand it, the question of whether or not a paper called an order, provided it is clearly on its face an interlocutory order, is entered, or whether or not it

stands as the Clerk entered it in the mintue book so far as I can see is substantially immaterial, and I am therefore willing to concede that much. It is possible that other practices may think that the entry of the order is the more regular form, and that Mr. Stanchfield is entitled to it. I am willing that he should have it; I only— 223

Mr. Stanchfield: Should have what order?

Mr. Stimson: Should have an order in the form which I have presented to the Court.

The Court: He doesn't want that.

Mr. Stimson: Should have the formality of an order expressing what was informally expressed verbally by your Honor to the Clerk. 224

Mr. Stanchfield: I have asked for the relief I claim I am entitled to, and your Honor denies it.

The Court: I will say now that if the parties want the record made up, that the Court thereupon ordered that the plea in bar be dismissed, why that entry may be made, if counsel agree to it.

Mr. Stanchfield: The form in which I contend that recital should be is embraced in the papers that I have submitted to your Honor, and which you have refused to direct to be spread upon the minutes.

the Court, of course, within your control, and any such correction as is suggested to conform to the Clerk's entries to the facts as your Honor's recollection makes it, is within your Honor's power, and my suggestion was along that line. 225

The Court: My idea of the common law pleading is that where an issue of fact is raised, and that issue comes to judgment, judgment in chief, and it is spread on the record, the respondent stands for sentence. Now I understood at the close that the Government did not ask for a judgment in chief, or for any judgment; that they preferred that no man should be sentenced until he has had

226 a trial on the merits, and therefore, no judgment was rendered. The result of the verdict was as a matter of law, as I understand it, that the plea in bar is dismissed and it may be entered as the order of the Court nunc pro tunc, if either side desires it, but I do not understand that Mr. Stanchfield cares for that; he wants a final judgment.

Mr. Stimson: Your Honor, my plain proposition is that if Mr. Stanchfield is going to contend that putting what took place in the form of an order is material, I am perfectly willing that such an order should be entered; I do not wish the refusal to enter it to be made the basis of a mandamus.

227 The Court: I do not refuse to make the order.

Mr. Stanchfield: I do not ask for any order; I ask for precisely the relief called for by the motions I have made, and I understand to have been denied, and I except to the ruling.

Mr. Stimson: If your Honor desires a more formal paper, I will prepare it.

The Court: As to the verdict the records of the Clerk show that. It does not need the order of the Court; there is no correction to be made there that the Court set the trial for March 1st at 10:30 o'clock in the forenoon, because the records of the Clerk show that. The only thing that the Clerk's

228 record does not show is that the Corut made an order that the plea in bar be dismissed, and I have no recollection of any such order being made, but my understanding of it is that what transpired amounted to that in legal effect.

Mr. Stimson: And your Honor is willing that that statement should be made upon the record?

The Court: Yes.

Mr. Stimson: To that I have no objection.

Mr. Stanchfield: It seems to me we are having a good deal of useless repetition of this situation.

I except again to that and contend likewise that the legal effect operated as a judgment predicated upon a verdict of the jury, and I again take an exception to your refusal. 229

The Court: There is no occasion for your repeating.

Mr. Stanchfield: Not the slightest. Mr. Stimson is guilty of that.

Mr. Stimson: Since this matter is now pending in the Supreme Court, I ask to have the case against all of these defendants set over until two weeks from to-day and that the defendants be directed to return upon their bonds at that time, at 10:30 of Wednesday, March 16th. 230

Mr. Stanchfield: To that order as far as the defendant Heike is concerned we object.

Trial set for March 16th, 1910, at 10:30 o'clock a. m.

231

Supreme Court of the United States,

OCTOBER TERM, 1909.

ORIGINAL.

IN THE MATTER

OF

The Application of CHARLES R. HEIKE, Praying for a Writ of Mandamus.

Answer of James L. Martin, District Judge of the United States for the District of Vermont, sitting in the Circuit Court for the Southern District of New York, and the Circuit Court of the United States for the Southern District of New York to Petition for an order to show cause why a Writ of Mandamus should not issue.

TO THE HON. MELVIN W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Counsel for Charles R. Heike applied to me for a correction of alleged errors in the clerk's records of the proceedings upon the trial of the plea of said Heike to the indictment heretofore filed against him on January 14th, 1910. During the progress of this

application, Counsel for Heike intimated that it was their intention to apply to the Supreme Court for further proceedings to correct said alleged errors, in the event that I should not myself make such corrections. This case is an important one, and it is evident that the trial of the indictment will occupy a long time. A delay in bringing this trial on will cause great embarrassment, in view of the congested state of this Court's calendar, and in view of the condition of my own calendar in the District of Vermont, from which District I have been specially assigned to the trial of this case, owing to the aforesaid congested condition of the New York calendar. In the interest of speedy justice in this case, therefore, and to avoid such embarrassing delay to both of these Courts, I do hereby respectfully present, in answer to the application thus intimated by Heike's Counsel, as follows:

The disposition which I made of the said application by Heike's Counsel on March 2d, 1910, is shown in full in the transcript of the Stenographer's Minutes, a certified copy of which I attach hereto and make a part hereof (Appendix A). The docket entries of the Clerk of this Court, a certified copy of which I also attach hereto and make a part hereof (Appendix B) set forth fully and accurately what took place in this respect upon the trial of the said Heike and upon the direction by me of a verdict against his plea. At the close of said trial and after the direction of the verdict by the Jury, the Government, on the request of the Defendant, refrained from asking for a judgment in chief or for any judgment. In lieu of such judgment, the Defendant pleaded Not Guilty, his Plea was accepted by the Court, and the trial on this new Plea of Not Guilty was by order of the Court set for March 1st, 1910, at 10:30 o'clock, all of which is as shown in the said docket entries of the Clerk and in the certified copy of the Stenographer's Minutes taken at the time of the said direction of the verdict and subsequent pleading over, which is also hereto annexed and made a part hereof (Appendix C).

The Solicitor General of the United States, having desired to be heard in this matter, in order to secure him such opportunity in case such an application should be made by Heike's Counsel, the respondents hereby designate him, or such associate Counsel as he may select, to present this Return, and to file such Brief and to make such Argument as may be required herein.

JAMES L. MARTIN,
United States District Judge sitting in the Circuit Court.

March 3, 1910.

APPENDIX A.

Certified Record of Proceedings on Motion to Correct Docket Entries.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES vs. CHARLES R. HEIKE ET AL.	Before HON. JAMES L. MARTIN, Judge.

NEW YORK, March 2nd, 1910.

Appearances :

MR. STIMSON,
MR. DENISON and
MR. FRANKFURTER for the Government;
MR. STANCHFIELD for defendant Heike,
MR. MACKELLAR for defendant Gerbracht,
MR. O. N. BROWN for defendant Bendernagel,
MR. COCHRANE for other defendants.

MR. STIMSON : If your Honor please, in the case of the United States against Heike and others I understand that the Court yesterday extended the bail for the appearance of the defendants until today, and that they are to be here today.

MR. STANCHFIELD : Speaking in behalf if your Honor please, of the defendant Charles R. Heike, I desire to call your Honor's attention to the situation that now exists in that case. Subsequent to the trial that took place before you and a jury upon the plea of immunity which was interposed to the indictment by

the defendant Heike, a writ of error and a supersedeas has been allowed by an associate Justice of the Supreme Court of the United States; that writ of supersedeas was allowed, if recollection serves me correctly, upon Friday last; the papers reached New York for the purpose of being filed in the proper offices and for service on the following morning, to wit, last Saturday. Before those papers reached this city or reached counsel representing the defendant Heike notice of motion for dismissal of that writ of error and the vacation of the supersedeas returnable upon Monday morning last at the opening of the United States Supreme Court in Washington [was served by the Government]. In obedience to that notice counsel for the defendant Heike appeared before the Supreme Court at Washington and at the time of the argument a few minutes—I want to speak with absolute accuracy—a few minutes before the case was called to the attention of the Supreme Court, we were handed a printed paper in the Heike case entitled "A motion to vacate order allowing writ of error and to vacate supersedeas, and stay proceedings", which consists of a short brief by Mr. Lloyd W. Bowers, the Solicitor General, an affidavit of Mr. Henry L. Stimson, your Honor's opinion in deciding the issues raised by the immunity plea and a copy of the docket entry in the United States against Heike *et al.* certified to by John A. Shields, Clerk of the Court and an extract from the stenographer's minutes. It is not necessary for me to state in detail what else appears in that paper.

Now upon the oral argument which was permitted in this matter before the United States Supreme Court the point was made that the records did not disclose a judgment upon the immunity plea and upon that question argument was had orally running over perhaps half an hour—I don't know but more, that is rather a matter of immateriality and indifference at this stage of the case. As a result of that oral argument before the Supreme Court an order was made by the Honorable Chief Justice that upon Monday coming, to-wit,

next Monday, the counsel for Heike should file a brief in answer to the brief handed us last Monday morning.

Now if your Honor will look at page 20 on the top line of the page [of the printed motion papers], under date of February 14th you will observe this entry "Trial concluded; verdict of dismissal of plea in bar entered".

Now with reference to that situation I desire to make this observation: That is a copy of the docket entry, I suppose an entry made by the clerk reflecting what he assumed or understood to be the proper entry. My recollection is and I think your Honor will coincide with me in that respect that the verdict was not in that form. Your Honor yourself either wrote out or dictated the verdict—I don't recollect which—stating in substance that upon the issues raised by the indictment the immunity plea and the replication and various papers involved, the jury should return a verdict in favor of the government. I don't assume if your Honor please, to give the exact phrasing of that paper for I haven't seen it from that day until this, but that was the substance of it.

THE COURT: You mean the verdict?

MR. STANCHFIELD: Yes. I think your Honor's recollection coincides with mine in that respect, that it is not a full statement of it but it is the substance of it.

Now this is the situation, if your Honor please: An issue was framed and a jury was drawn, evidence was taken and a trial was had and a verdict rendered. Now that constituted the proceeding crystallizing in a judgment, technically speaking, I presume, a judgment of *respondeat ouster*. Now, if the clerk entered anything in the docket he should have entered instead of verdict dismissing plea in bar, "judgment dismissing plea in bar entered upon the verdict." I shall first ask your Honor to correct as of February 14th that entry upon the docket by changing the word "verdict" to the word "judgment."

Now the mere fact that your Honor directed a verdict and then permitted us to plead over constitutes a judgment.

THE COURT: That is in the opinion, if I remember correctly.

MR. STANCHFIELD: Of course it is in the opinion. What I am trying to get straightened out for reasons I will explain in a moment is the record. I am not asking your Honor to do anything except what I professionally regard as strictly and absolutely right.

MR. STIMSON: Your opinion ended page 17 near the bottom.

THE COURT: And there should therefore be a verdict ordered to that effect?

MR. STANCHFIELD: Of course I know your Honor ordered a verdict. There is no dispute on that. That is my position, and I think your Honor's recollection is with mine as to the practical substance of the plea.

MR. STIMSON: Nothing that his Honor has said yet has indicated that his recollection is with yours as to having ordered any judgment. I wish to be heard before any statement to that effect goes on the record. This is being taken for use elsewhere your Honor and I wish to have the statement careful and correct.

MR. STANCHFIELD: I have not represented in any way Judge MARTIN as yet having said anything about any judgment. I am reciting exactly and carefully what took place and I have made clear the relief that I am first asking with reference to your correcting the docket of this Court and of your own clerk by changing that word "verdict" to "judgment."

MR. STIMSON: May I be heard on that or do you wish to make the rest of your motion?

MR. STANCHFIELD: I am not through and we might as well let this go until I am finished to keep the record straight.

Now an associate Justice of the Supreme Court having allowed this writ of error upon the merits of this case which I am not proposing to further discuss here or now, I ask your Honor in the administration of justice to conform this record—to conform the record—to what took place in legal contemplation and in legal effect before you at that trial. My argument is

that when your Honor directed the verdict of the jury that was prepared for them to sign, when that verdict was returned and your Honor permitted a plea over of not guilty there was of necessity a judgment of *respondeat ouster*. There could be no such legal performance as then occurred without your Honor presupposes the judgment of *respondeat ouster ;* there ought to be the judgment of *respondeat ouster* before anything else could happen, could transpire, could be done; and I ask your Honor respectfully in the due administration of justice and to protect this defendant's rights to grant the following order *nunc pro tunc* which I will read : " At a stated term of the United States Circuit Court for the Southern District of New York held at the United States Court house and Post Office Building in the Borough of Manhattan City of New York Southern District of New York, on the 2nd day of March 1910. Present : Hon. JAMES L. MARTIN, United States Circuit Court Judge. United States of America vs. Charles R. Heike, impleaded with others, defendants ", and, now, March 2nd, if your Honor will watch me for a moment —on March 2nd 1910—" The Court hereby ordered and directed the Clerk of the Court to enter upon the minutes as of February 14th 1910, after the record of the verdict, *nunc pro tunc*, judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over ". If your Honor wants a technical copy of that I have an extra one here ; you need not bother to write it down. Because it is our contention that what transpired at the time is embraced accurately and fairly in the judgment that that order asks you to enter.

MR. STIMSON : Now if your Honor please in regard to that I have this to say : The contention of the defendant upon which this writ of error was obtained reduces simply to an attempt to confuse two entirely distinct things, an attempt to confuse an interlocutory order which under the Federal practice is not now and never has been appealable, with a final judgment in a

criminal case, which is appealable. The papers before the Supreme Court embody a transcript of the minutes taken before this Court, a record of what actually took place before your Honor and show precisely this distinction. I call your Honor's attention to page 9 of the motion papers—and your Honor will doubtless recollect what happened as embodied in the stenographer's minutes printed on that page. Your Honor will remember that after you had finished your opinion announcing that you would direct a verdict, Mr. Stanchfield at once jumped to his feet excepted and pleaded not guilty. The stenographer's minutes are as follows:

> "MR. STANCHFIELD: The defendant excepts, if your Honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it.
>
> THE COURT: The defendant excepts to the motion made for a verdict and excepts to the Court's granting a motion on the part of the Government?
>
> MR. STANCHFIELD: Yes, sir; and I was about to say that we except to your granting the motion of the counsel for the government against the plea; and upon the general issues the defendant, your Honor, if you please, pleads not guilty.
>
> MR. STIMSON: I was going to suggest my friend's plea is premature. Has your Honor yet directed a verdict?
>
> THE COURT: Well he understands so.
>
> MR. STANCHFIELD"—

I think that is a mistake by the stenographer for Mr. Stimson—

> "MR. STANCHFIELD: I have not heard the jury render any verdict of the Court yet. (The

> Foreman of the Jury signed a written verdict pursuant to the directions of the Court.)
> MR. STIMSON "—

and now comes the point—I then gave notice that I was about to move for what would be the real final judgment unless the defendant objected to it. My language as quoted in the stenographer's minutes is:

> "I am going to ask whether the defendant has any further motions before the motion for sentence.
> MR. STANCHFIELD: We have have no further motions; we plead not guilty to the indictment."

Then followed as your Honor will remember, an argument set out in here as to the discretionary power of the Court and your Honor, in view of my withdrawing any objection to their having the discretionary right to plead over, refrained from entering any final judgment of sentence and permitted them to plead over. That matter was brought out very fully in the argument before the Supreme Court, and the question is simply this: The defendant when confronted with the alternative of either having a final judgment pronounced upon him and standing as a sentenced criminal on the one side, which would give him a right to appeal, deliberately and on the earnest request of his counsel, chose the other course which prevented such a final judgment from being entered and obtained from the mercy of the Court the right to plead over, the privilege of pleading over. Having done that he now goes to a Justice of the Supreme Court and seeks to get the right to appeal —from what? From the interlocutory order or verdict or order entered on the verdict if there should be one, directing a verdict against his plea of immunity after he has waived it by pleading not guilty and going on.

Now this motion this morning is a further attempt on that same line by introducing into the record of the Court the word "judgment"; is a plain continuation of the attempt to give the color of a final judgment to the transaction which took place before your Honor, that transaction in substance being a case where he had begged that a final judgment should not enter and succeeded in preventing it.

Now upon question of whether or not any further step in the record is necessary or proper, my own impression of the practice is that no order of any kind is necessary beyond the direction of your Honor to the foreman of the jury to return such a verdict, and the returning of the verdict precisely as the stenographer's minutes show took place. The record of the clerk of the Court, as my friend has conceded on his argument, represents precisely what was done. There is no doubt about that.

THE COURT: The only thing I observe in this record, Mr. Stimson, is that it is the verdict of the jury; I think the verdict was dictated.

MR. STIMSON: Here is the verdict (showing a paper).

THE COURT: This record that I have before me says that the jury returned a verdict in substance that the plea being dismissed—

MR. STIMSON: That is an informal statement of the precise language of the verdict which you directed and which the foreman returned, and which reads as follows: "We, the jury, upon this issue before us raised by the special plea in bar, the replication and rejoinder, find for the United States."

THE COURT: Of course, the clerk's record must be right.

MR. STIMSON: This paper I have in my hand I understand comes from the clerk. This is the original verdict we got from the clerk. Of course, I have no objection to the words "verdict dismissing plea in bar" in it being changed to conform to the exact language of the original verdict. Now, I further question whether there should be any further action of

your Honor sitting as the Court after that verdict. It is possible that the government will have no objection on conference to having an order in the form clearly of an interlocutory order entered upon the records, provided it be not done so as to give the color of a form of final judgment, which Mr. Stanchfield's motion aims to give it. To talk of a judgment *respondeat ouster* in any sense of a final judgment is to talk of two mutually inconsistent things—*respondeat ouster* meaning on its face that any order giving it is not final. That is what this situation reduces to. To speak of a final judgment *respondeat ouster* is to make, colloquially, an Irish bull.

Now, I should also, I think, remind your Honor before I sit down, of the argument which my friend made in open court before your Honor on this very question. There was no doubt in his mind, so far as he expressed his mind to your Honor at the time when he was asking a question whether or not your Honor should direct a verdict, that he had no right of appeal. This is the quotation from the argument made before your Honor at page 4 of the record; Mr. Stanchfield: "Whether or no your Honor is familiar with the fact, I am not advised, but subsequent to the decision in the case of U. S. v. Armour, congress passed a law conferring upon the Government the right of appeal in cases analogous to the situation that here exists. That is, if your Honor were disposed to uphold our contention and direct a verdict in favor of the defendant upon this proceeding the United States Government have a right to review that decision. If, upon the other hand, you should decline to direct a verdict in our behalf, and should direct one in favor of the Government, why then there is left to us under that statute, for reasons I do not understand, no right of appeal. In other words, we would be relegated to a trial upon the merits, and the only way in which we could review the question at all would be in the event of disaster upon the trial, and in the record going up from that result probably would be incorpo-

rated as a part of the record the proceedings that had taken place upon the trial of this preliminary plea." My friend's statement there as to the law is undisputed as far as I know until this motion was made, the undisputed practice of the Federal Courts, the practice upon which we stand now, the practice upon which we moved day before yesterday in the Supreme Court to set aside the order granting this unprecedented writ of error, and the practice upon which I trust the Supreme Court will find that writ of error should be set aside.

I suggest to your Honor that I shall myself consider the draft that we are at work on now of a possible interlocutory order, and discuss it with my associates here, and perhaps in that event suggest to your Honor a form to which we have no objection; but the matter having been brought up now for the first time I wish a few minutes to do that.

MR. STANCHFIELD: Now, if your Honor please, in reply I have this general answer to make to what I regard as a most unfair, discourteous and unprofessional criticism made by Mr. Stimson, both in this printed brief and upon the argument before you with reference to the position I took upon the question of appeal. It is perfectly apparent to any fairminded man who reads that argument that I was discussing a right of appeal under the statute passed by the Congress of the United States subsequent to the decision in the Armour case, and that all the way through, in the language which he questions there was reference direct and indirect to that statute, and that my argument and contention at that time was predicated upon that statute and no other.

Now I understood that granting this order is a matter of right and a matter of course, and that this defendant is entitled to have that relief. I have now no opinion to express one way or the other with reference to any orders or amendments that Mr. Stimson desires your Honor to make; I am asking for the

relief that my motion calls for to meet a criticism already made by the Government, that is on file in the Supreme Court of the United States at Washington. They cannot be permitted to file or use additional papers upon Monday next. The only thing that is there is for me to file by order of the Court an answer to this printed paper, calling for the dismissal of this writ of error, and the vacation of that supersedeas, and in order that the record shall fairly present what I assert took place before you in the very nature of things I am asking that the records—your records of this court—be corrected to correspond to the facts, and I do that in the interests of time and to avoid any further delay or the necessity of my instituting any further proceedings in the Supreme Court of the United States to obtain the taking up of this entire record so that it can determine for itself, in the event this relief is refused, whether or no any such judgment was in fact had.

THE COURT: My recollection is quite clear as to what occurred at the trial. I observe here at page 9 of the printed motion the Court says: "Well, he understands so". The word "he", I don't know what it would relate to there, but the Court intended that it should have reference to the Court—that the Court understood that he directed a verdict; that was the meaning of what was said there. I have no recollection of directing judgment in the case one way or the other. I intimated some time before the trial of this issue on the plea in bar that the respondent was not entitled to two separate, independent jury trials as a matter of right, and I also intimated that the Court would not be inclined to exercise its discretion in permitting the respondent to plead over if the Court thought it was done for delay. On the close of the trial and the verdict referred to, writing it out by the Court, the dictating of it by the Court, and the signing of it by the foreman, the only thing that I recall now is that counsel for the defendant asked leave to enter a plea of not guilty. There

were remarks made by the District Attorney preceding that or immediately after that as to whether there were other motions to be made before sentence, and Counsel for Mr. Heike, Mr. Stanchfield I think, said that they entered a plea of not guilty, and Mr. Stimson, in behalf of the Government, did not object to it, and thereupon the Court made the remark that he had seen nothing to indicate that it was purely for delay, and therefore granted that right to enter a plea of not guilty. I should understand that any court would construe that proceeding to be an order in effect dismissing the plea in bar; whether I so stated at the time or not I have no recollection, but that was my understanding of it, so that I say now that may be incorporated in the record if desired, that my understanding of what occurred amounted to an order by the Court upon that verdict dismissing the plea in bar.

MR. STIMSON: I have no objection—

MR. STANCHFIELD: To that I except.

MR. STIMSON: That order should be entered in that form. It is rather informally drawn. (Handing paper to Court).

MR. STANCHFIELD: Will your Honor rule upon my two motions?

THE COURT: I may just state the rule as I have indicated here, no more and no less.

MR. STANCHFIELD: Your Honor declines, then, to rule upon the specific motions that I made?

THE COURT: The Court rules that there was nothing said or done at that time as to a judgment; whether what was said amounts in legal effect to a judgment, why, the Supreme Court can pass upon it. It is not necessary for me; I cannot change the record.

MR. STANCHFIELD: Then I except.

MR. STIMSON: As part of that I move that—

MR. STANCHFIELD: If your Honor please I insist upon getting this record straight. I have the floor at the present time; I haven't any objection to Mr. Stimson making all the motions he pleases when it is his turn.

THE COURT: The Court declining to go further, as I understand, Mr. Stanchfield desires an exception.

MR. STANCHFIELD: I except specifically to your refusal to amend the entry under date of February 14th, at the top of page 20, by substituting the word "judgment" in the place of the word "verdict." I also specifically except to your Honor's refusal to enter the formal order of judgment *nunc pro tunc* in the language "Judgment be and is hereby entered for the United States upon the verdict with leave to the defendant to plead over."

MR. STIMSON: Upon that, your Honor, I move that your Honor amend the docket entries of the Clerk in the form which I have drafted there roughly; I will put it in typewritten form if your Honor desires, and I should prefer to have no further ruling made until that is passed on. It is a little hard to read in longhand. This is merely a more formal way of expressing what I think you have expressed informally by dictation to the Clerk.

MR. STANCHFIELD: I object to any—

THE COURT: Doesn't the Clerk's record show that the case was set down for trial on March 1st?

MR. STIMSON: The Stenographer's minutes show that, but the docket does not, and for that reason I wish to have the docket conform to the Stenographer's minutes, which I now hand your Honor.

MR. STANCHFIELD; I object at this time and place to any amendment made or asked putting in the docket entries or any records of this Court to change the existing situation.

MR. STIMSON: And I state that my motion is to supplement the motion made by Mr. Stanchfield, except that it conforms to what I conceive to be the real facts, and I leave it to the Court to decide between us.

THE COURT: Does not the Clerk's record also show that the Respondent entered a plea of not guilty?

MR. STIMSON: Oh yes.

MR. STANCHFIELD: Certainly. You have it on page 20, the second sentence.

THE COURT: The only amendment—you see I cannot amend this statement, and you don't ask for that. The only thing I could alter would be the Clerk's minutes to show the adjournment of that hearing to March 1st at 10:30. You say that does not appear on the Clerk's record?

MR. STANCHFIELD: To that I take an exception. I never saw the Clerk's record.

THE CLERK: I took it down this way in the record: On motion of Mr. Stimson, case set for trial on Tuesday March 1st, 1910, at 10:30 a. m.

THE COURT: You have it right there in the record.

MR. STANCHFIELD: To that I take an exception.

THE COURT: I will let this matter stand as the records show it, with the statement I have made here as to my understanding of the legal effect.

MR. STIMSON: Your Honor, I make this suggestion: While your Honor's statement conforms to the practice of this district, as I understand it, the question of whether or not a paper called an order, provided it is clearly on its face an interlocutory order, is entered, or whether or not it stands as the clerk entered it in the minute book so far as I can see is substantially immaterial, and I am therefore willing to concede that much. It is possible that other practices may think that the entry of the order is the more regular form, and that Mr. Stanchfield is entitled to it. I am willing that he should have it; I only—

MR. STANCHFIELD: Should have what order?

MR. STIMSON: Should have an order in the form which I have presented to the Court.

THE COURT: He doesn't want that.

MR. STIMSON: Should have the formality of an order expressing what was informally expressed verbally by your Honor to the Clerk.

MR. STANCHFIELD: I have asked for the relief I claim I am entitled to, and your Honor denies it.

THE COURT: I will say now that if the parties want the record made up, that the Court thereupon ordered that the plea in bar be dismissed, why that entry may be made, if counsel agree to it.

MR. STANCHFIELD: The form in which I contend that recital should be is embraced in the papers that I have submitted to your Honor, and which you have refused to direct to be spread upon the minutes.

MR. STIMSON: Your Honor has the records of the Court, of course, within your control, and any such correction as is suggested to conform to the Clerk's entries to the facts as your Honor's recollection makes it, is within your Honor's power, and my suggestion was along that line.

THE COURT: My idea of the common law pleading is that where an issue of fact is raised, and that issue comes to judgment, judgment in chief, and it is spread on the record, the respondent stands for sentence. Now I understood at the close of the case that the Government did not ask for a judgment in chief, or for any judgment; that they preferred that no man should be sentenced until he has had a trial on the merits, and therefore, no judgment was rendered. The result of the verdict was as a matter of law, as I understand it, that the plea in bar is dismissed and it may be entered as the order of the Court *nunc pro tunc*, if either side desires it, but I do not understand that Mr. Stanchfield cares for that; he wants a final judgment.

MR. STIMSON: Your Honor, my plain proposition is that if Mr. Stanchfield is going to contend that putting what took place in the form of an order is material, I am perfectly willing that such an order should be entered; I do not wish the refusal to enter it to be made the basis of a mandamus.

THE COURT: I do not refuse to make the order.

MR. STANCHFIELD: I do not ask for any order; I ask for precisely the relief called for by the motions I have made, and I understand to have been denied, and I except to the ruling.

MR. STIMSON: If your Honor desires a more formal paper, I will prepare it.

THE COURT: As to the verdict the records of the Clerk show that. It does not need the order of the

Court; there is no correction to be made there that the Court set the trial for March 1st at 10:30 o'clock in the forenoon, because the records of the Clerk show that. The only thing that the Clerk's record does not show is that the Court made an order that the plea in bar be dismissed, and I have no recollection of any such order being made, but my understanding of it is that what transpired amounted to that in legal effect.

MR. STIMSON: And your Honor is willing that that statement should be made upon the record?

THE COURT: Yes.

MR. STIMSON: To that I have no objection.

MR. STANCHFIELD: It seems to me we are having a good deal of useless repetition of this situation. I except again to that and contend likewise that the legal effects operated as a judgment predicated upon a verdict of the jury, and I again take an exception to your refusal.

THE COURT: There is no occasion for your repeating.

MR. STANCHFIELD: Not the slightest. Mr. Stimson is guilty of that.

MR. STIMSON: Since this matter is now pending in the Supreme Court, I ask to have the case against all of these defendants set over until two weeks from to-day and that the defendants be directed to return upon their bond at that time, at 10:30 of Wednesday, March 16th.

MR. STANCHFIELD: To that order as far as the defendant Heike is concerned we object.

Trial set for March 16th, 1910, at 10:30 o'clock A. M.

The foregoing constitutes a true and complete transcript of the proceedings upon the application of Counsel for Charles R. Heike made on March 2nd, 1910, to correct alleged errors in the docket entries upon the trial of the plea in immunity heretofore filed by said Heike.

JAMES L. MARTIN,
U. J. Judge.

March 3, 1910.

APPENDIX B.

Certified Copy of Docket Entries in United States v. Charles R. Keike et al.

U. S. v. CHARLES R. HEIKE, ERNEST W. GERBRACHT, JAMES F. BENDERNAGLE, HARRY W. WALKER, JEAN M. VOELKER & JAMES F. HALLIGAN, JR.	Hy. A. Wise U. S. Atty. John B. Stanchfield Atty. for Heike. §§ 5445, 5440 § 9 Act June 10, 1890 "Doc. 2-356."

Jan. 14 1910 *Entered presentment of Indictment.*
" 14 " Filed Indictment.
" 17 " *Deft Heike pleads not guilty* One week to withdraw. Bail $5000
" 17 " " Gerbracht pleads not guilty. One week to withdraw.
" 17 " " Bendernagle pleads not guilty. One week to withdraw.
" 17 " " Walker pleads not guilty. One week to withdraw. Bail $3000
" 17 " " Voelker & pleads not guilty. One week to withdraw.
" 17 " " Halligan Jr. pleads not guilty. One week to withdraw.
" 24 " " *Heike filed plea in bar.*
" 24 " Defendants Gerbracht, Walker, Voelker, Bendernagel & Halligan plead not guilty with leave to withdraw and file plea in bar on Jan. 28, 1910.
" 28 " Filed Plea in Bar of Gerbracht.
" 28 " " " " " " Bendernagle
" 28 " " " " " " Walker
" 28 " " " " " " Halligan, Jr.

Jan. 28 1910 Filed Affidavit & Order impounding five letter press books.
" 17 " " Recognizance of Heike.
" 17 " " Recognizance of Walker.
Feb. 2 " " Replication to plea in Bar as to Heike
" 2 " " Replication to plea in Bar as to Gerbracht
" 2 " " Replication to plea in Bar as to Bendernagle
" 2 " " Replication to plea in Bar as to Walker
" 2 " " Replication to plea in Bar as to Halligan Jr.
" 4 " Deft. Gerbracht withdraws plea in bar and pleads not guilty
" 5 " " Bendernagle withdraws plea in bar and pleads not guilty
" 5 " " Walker withdraws plea in bar and pleads not guilty
" 5 " " Halligan withdraws plea in bar and pleads not guilty
" 5 " " Heike files rejoinder to replication to special plea-in-bar.
" 10 " Filed additional plea in Bar. Heike.
" 10 " *Trial begun as to Heike "Plea-in-Bar"*
" 11 " " continued and adjd. to Feb. 14.
" 14 " " concluded. Verdict dismissing "Plea in Bar" entered.
" 14 " *Deft. Heike pleads not guilty. Case set for trial Tues. Mch. 1, 1910, 10 1/2 A. M.*
" 26 " Filed Stenographers minutes by telephone Order from Judge MARTIN. Stenographers minutes delivered to Mr. Denison Asst. Atty. General, the same to be returned by said Denison to the files of this Court.
" 26 " " Order *Re* Stenographers mnnutes.

Feb. 25 1910 Filed Assignment of Errors.
" 26 " " Order allowing supersedeas and writ of error.
" 26 " " Petition for writ of error.
" 26 " " Citation.
" 26 " " Writ of Error.

A true copy of the Docket entries. Criminal Docket 2–356.

JOHN A. SHIELDS
Clerk
U. S. Circuit Court
Southern District
of N. Y.

[SEAL.]

APPENDIX C.

Extract from the stenographer's minutes of the proceedings at the conclusion of the trial on the plea in bar of the defendant Heike.

MR. STANCHFIELD: The defendant excepts, if your Honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it.

THE COURT: The defendant excepts to the motion made for a verdict and excepts to the Court's granting a motion upon the part of the government.

MR. STANCHFIELD: Yes, sir; and I was about to add that we except to your granting the motion of the counsel for the government against the plea; and upon the general issues the defendant, your Honor, if you please, pleads not guilty.

MR. STIMSON: I was going to suggest my friend's plea is premature. Has your Honor yet directed a verdict?

THE COURT: Well, he understands so.

MR. STANCHFIELD: I supposed so.

MR. STIMSON: I have not heard the jury render any verdict of the Court yet.

(The foreman of the jury signed a written verdict pursuant to directions of the Court.)

MR. STIMSON: I am going to ask whether the defendant has any further motions before the motion for sentence.

MR. STANCHFIELD: We have no motions; we plead not guilty to the indictment.

MR. STIMSON: I have already stated to the Court my view that that is a matter for the discretion of the Court. I supposed that counsel for the defendant

would not state it as a right, but would address to the Court the reasons which in their opinion might appeal to the Court's discretion for the granting of that motion.

THE COURT: What do you say about it? Do you object to it?

MR. STIMSON: I was listening to hear the reason adduced for it. If I am asked the question directly, I believe that the matter is one for the Court's discretion; that it is for the Court to say whether or not the defendant shall be allowed to plead over. I think that is all very clear, and I having stated it before, understood that that was the view of the Court. I am bound to say that in this case in view of the novelty of the situation which has arisen, and in view of the testimony of the defendant on the stand in this trial which differed materially from the plea put in by his counsel, I am inclined on the part of the government not to oppose the granting of this privilege of pleading over if the Court in its discretion takes the same view. I am unwilling that it should pass as if it were a right on the part of the defendant, and I have already stated very fully my reasons for deeming it not to be a a right. I also have the feeling, and that bears directly upon this question, that it should not be allowed except upon conditions imposed in the interest of speedy justice. The defendant has been allowed to take a dilatory plea, that according to the law cancels his right to any further pleading in court of his right. If the Court is to grant him a further privilege of putting in a second plea, not his by right, the Court certainly has the right, and in the interest of justice should, exact such conditions as will insure the speedy furtherance of justice in this Court.

MR. STANCHFIELD: In answer to that, if your Honor please, I have this observation to make: I have understood that no request would emanate from the government counsel for sentence at this time, and it was in accordance with that understanding that I had made no reference to any desire to be heard upon that ques-

tion. We are prepared to argue it at length. I have a great many—

THE COURT: In view of the position taken by counsel here, without taking any time for going to the jury, arguing the questions of fact, and putting the Court to the trouble of instructing the jury, leaves the matter in very different shape than if you had insisted on going to the jury to see if you could not get a disagreement and all that, which I understood very frequently is the case in special matters that are pleaded, but coming to me in the utmost good faith now, claiming there is no dispute as to the evidence, purely a question of law, I certainly should not insist upon judgment in chief unless the Government urge it, and they do not in this case, and I don't know what I should say about it if they did.

MR. STANCHFIELD: That would require another half day of argument probably to get that in and thrashed out, because I certainly am pretty sure of our position that we could convince you that the defendant ought to be—

THE COURT: There is nothing that indicates to me that counsel resorted to this for delay. Of course, the Court has taken some little time in thinking it over, but that is not chargeable to you. I do not see that it is necessary for the Court to make any ruling about unnecessary delay; unnecessary delay would not be permitted anyway.

MR. STIMSON: I was going to suggest this consideration at once: That the case should be set for trial for the opening of the March term, on March 1st, if no other suggestion occurs to the Court.

MR. STANCHFIELD: I haven't anything to say to that suggestion at the present time.

MR. STIMSON: The statute in regard to demurrers, Sec. 1026, expressly makes that as one of the conditions suggested by the statute, that the case shall proceed at the same term in case of a *respondeat ouster*. Now, I do move for a direction of the Court that this case now be set for trial on March 1st.

THE COURT: I understand it has been so understood by counsel all round.

MR. STIMSON: There has been no ruling by the Court, and this is a situation which now arises for the first time as to this defendant.

THE COURT: The case may be set for trial on Tuesday, March 1st 1910, at 10:30 o'clock A. M.

I hereby certify that the foregoing is a full and complete transcript of the proceedings held on February 14th, 1910, following the rendition of a verdict upon the trial of a plea of immunity heretofore filed by the defendant, Heike, and the entry and acceptance of the plea of not guilty.

JAMES L. MARTIN,
U. S. Judge.